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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-954

WESTERN FUELS ASSOCIATION, INC. and
MOON LAKE ELECTRIC ASSOCIATION, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners Western Fuels Association, Inc. ("Western Fuels") and Moon Lake Electric Association ("Moon Lake") respectfully pray that a writ of certiorari be issued to review the order and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit entered on September 20, 1978, in *Natural Resources Defense Council, Inc., et al.* v. *Hughes, et al.* (*NRDC* v. *Hughes*).[1]

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[1] In the District Court and in the Court of Appeals, all parties, except the intervenor-defendant Utah Power and Light Company, took positions adverse to that of the petitioners. Thus all parties, except Utah Power and Light are respondents herein. The respondents are: Plaintiffs below, Natural Resources Defense Council,

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit, not yet reported, appears in the Appendix hereto as Appendix E. The memorandum order of the United States District Court for the District of Columbia, not yet reported, appears in the Appendix hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 20, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May intervention be denied to an applicant for intervention where intervention is sought after judgment has been entered in the District Court and where the parties to the action jointly seek an amended judgment in the District Court which will substantially, materially and adversely affect the rights of the applicant for intervention?

REGULATION INVOLVED

This controversy presents issues with respect to Rule 24 of the Federal Rules of Civil Procedure which provides:

Inc., Environmental Defense Fund, Inc., Northern Plains Resource Council, Powder River Basin Resources Council, and Defendants below, Cecil D. Andrus, in his capacity as Secretary of Interior, and Larry E. Meierotto, in his capacity as Assistant Secretary for Policy, Budget and Administration and Frank Gregg, in his capacity as Director of the Bureau of Land Management, Department of the Interior.

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action

to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28 U.S.C. § 2403.

STATEMENT OF THE CASE

NRDC v. *Hughes* was initiated on October 21, 1975, by the Natural Resources Defense Council, Inc. and others (collectively referred to as "NRDC") who sued the Secretary of the Interior and subordinate Interior officials in the United States District Court for the District of Columbia. Alleging that the Secretary had not complied with the National Environmental Policy Act,[2] NRDC sought to restrain the Secretary from implementing a policy of resuming federal coal leasing. (A. 11a). Federal coal leasing had been suspended by the Secretary of the Interior under a self imposed moratorium commencing in 1970. Federal jurisdiction was claimed by NRDC pursuant to 28 U.S.C. §§ 1331 (a), 1361, 2201-02; 5 U.S.C. §§ 701 *et seq.*; and 42 U.S.C. §§ 4321 *et seq.* An investor-owned utility, Utah Power and Light Company ("Utah Power") intervened as a party defendant. (A. 12a).

The underlying merits of *NRDC* v. *Hughes* are not before this Court and are not presented by this petition. It is sufficient to note that on cross-motions for summary judgment, the District Court determined, on September 27, 1977, *inter alia,* that the Secretary had not complied with the requirements of NEPA in the implementation of the purported federal coal leasing program, that NRDC was entitled to judgment as a matter of law and that injunctive relief was appropriate. (A. 11a-36a).

[2] 42 U.S.C. §§ 4321 *et seq.* (NEPA)

The District Court thereupon entered an order requiring, *inter alia,* that the Secretary prepare a new programmatic environmental impact statement ("PEIS") analyzing the impacts of the purported federal coal leasing program and further ordering:

> [t]hat federal defendants, their agents and employees, and all those in concert or participation with them, are enjoined from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases, except when the proposed lease is required to maintain an existing mining operation at the present levels of production or is necessary to provide reserves necessary to meet existing contracts and the extent of the proposed lease is not greater than is required to meet these two criteria for more than three years in the future. . . . (A. 35a).

The September 27, 1977 injunction also specifically included a prohibition on the issuance of preference right coal leases. Both the Secretary and Utah Power filed notices of appeal.[3]

Western Fuels and Moon Lake were affected by the underlying case and the September 27, 1977 order since both Western Fuels and Moon Lake are applicants for federal preference right coal leases.[4] (A. 6a).

[3] Those two appeals were docketed in the United States Court of Appeals for the District of Columbia Circuit as Docket Nos. 77-2090, 77-2096.

[4] The term "preference right federal coal lease" refers to a lease issued pursuant to Interior regulations codified at 43 C.F.R. §§ 3520.1-1, and under the provisions of Section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b). Under those provisions, a person holding a valid prospecting permit "shall be en-

Prior to the entry of the September 27, 1977 order and, indeed, until late February 1978, Western Fuels' and Moon Lake's interests were, in their judgment at least, adequately represented by the Secretary and by the intervening defendant Utah Power. The latter had aggressively opposed plaintiffs' attempts to bring preference right leasing into the case and it timely filed a notice of appeal as did the Secretary.

To be sure, preference right leases could not, in view of the September 27, 1977 injunction, issue either pending completion of adequate programmatic, regional and site specific EIS's, or reversal of the September 27, 1977 order in appellate proceedings. However, at that stage it appeared that in the interim, pending either completion of appellate proceedings or appropriate EIS's, the necessary preliminaries involved in processing the Western Fuels' and Moon Lake's applications to the point of readiness for lease issuance would be taking place so that loss of time would be at least mini-

titled to a lease" if the permittee timely shows the existence of coal in commercial quantities. The PEIS which was issued in September 1975 states that at that time there were 183 applications for federal preference right coal leases. Presently, the number of applications before the Interior Department is approximately 176.

Further, no new preference right coal lease applications can be made to the Interior Department. Section 4 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, 90 Stat. 1083, which was effective August 4, 1976, terminates the issuance of coal prospecting permits which would have included preference provisions under the old law. However, the termination of the issuance of those permits was made subject to "valid existing rights," thus permit holders such as Western Fuels and Moon Lake still retain their preference status. *See American Nuclear Corp.* v. *Andrus*, 434 F.Supp. 1035 (D. Wyo. 1977). However, the numbers of preference right coal lease applications cannot now increase.

mized if a new federal leasing program were to materialize.

Documents from the Department of the Interior showed that the Department was going forward with regional and site specific environmental impact statements (also necessary preliminaries to lease issuances) covering Moon Lake's preference right lease applications and three of Western Fuels' four applications.

In an October 27, 1977 memorandum sent by Secretary Andrus to the Solicitor of the Interior Department and all Assistant Secretaries, Secretary Andrus transmitted his decision on regional coal EIS's.[5] In that memorandum, Secretary Andrus stated that in the Eastern Powder River Coal Basin, where Western Fuels' preference right lease lands are located, the regional EIS would go forward, and that site specific assessments of all preference right lease applications which have made a showing of commercial quantities of coal would be included in the regional EIS. Western Fuels was expressly included in the latter category. Further, as late as March 6, 1978, Western Fuels was formally notified by letters from the Bureau of Land Management of the Department of Interior [6] that West-

[5] That memorandum and certain of its attachments were appended as Appendix A to the March 13, 1978 Memorandum of Western Fuels Association, Inc. and Moon Lake Electric Association, Inc. In Opposition to the Federal Defendant's and Plaintiffs' "Joint Motion Under Rule 60(b) of the Federal Rules of Civil Procedure for an Order Approving Stipulation As An Appropriate Basis for Modification of the Permanent Injunction," which was filed with the District Court below.

[6] Those letters were appended as Appendices B and C to the March 13, 1978, Memorandum of Western Fuels Association, Inc. and Moon Lake Electric Association, Inc. In Opposition to the

ern Fuels had made the "initial showing" of commercial quantities required by the Interior Department regulations as to all four of its preference right lease applications. This determination clears the way for the next step of further processing by preparation by BLM of a technical examination and environmental analysis and report. 43 C.F.R. § 3521.1-4 and 5.

Further, in Secretary Andrus' September 7, 1977 memorandum, he indicated that in the Northwest Colorado coal area, where Moon Lake's preference right lease lands are located, the regional EIS would go forward and that the site-specific assessments of preference right leases would be made. Support documents underlying Secretary Andrus' memorandum showed that Moon Lake's preference right coal lease applications were earmarked for site specific assessment.

In the midst of this ongoing activity, all of which, petitioners understood, had been regarded by the Secretary of the Interior as being permitted under the provisions of the September 27, 1977 District Court order, the Secretary and NRDC precipitously entered into an agreement on February 25, 1978, which suddenly, substantially and adversely affected Western Fuels and Moon Lake. That agreement (A. 51a-52a) provides *inter alia,* that the Secretary and NRDC would submit jointly to the District Court a proposed modification to the Court's September 27, 1977 order. Assuming the proposed modification was accepted, the

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Federal Defendant's and Plaintiff's "Joint Motion Under Rule 60(b) of the Federal Rules of Civil Procedure for an Order Approving Stipulation as an Appropriate Basis for Modification of the Permanent Injunction," which was filed with the District Court below.

Secretary would withdraw his appeal from the adverse District Court decision and, astoundingly, would abandon his legal position and join forces with NRDC and support the affirmance of the District Court decision in any appeal of the District Court's decision.

On the heels of the announcement of the settlement agreement, Western Fuels and Moon Lake were informed that all further processing of their preference right lease applications had been terminated. Their prospective leaseholds were therefore excluded from consideration in the regional EIS's then under preparation and, as well, from site specific examination.

This Interior-NRDC agreement, which involved a proposal to amend the September 27, 1977 injunction, had the following adverse effects on Western Fuels and Moon Lake. First, it limited to twenty the number of preference right lease applications which could be processed to the point of readiness for lease issuance by the Interior Department. Second, it established criteria for those twenty applications which excluded Western Fuels' leases and could exclude Moon Lake's lease. Third, NRDC, the plaintiff in the District Court, was to have a role in choosing which preference right coal leases were to be processed.[7] Fourth, it gave Western Fuels and Moon Lake no opportunity to be heard on the framing of the criteria for choosing the twenty leases to be processed and apparently would exclude Western Fuels and Moon Lake from participating in the determination of which twenty preference right coal leases would be processed. (A. 51a-57a).

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[7] This provision concerning plaintiff participation in decision-making was not included in the amended order ultimately approved by the District Court.

Under the September 27, 1977 order, prior to the agreement of February 25, 1978 with its plan to seek an amendment of that order, Western Fuels' and Moon Lake's lease applications could be and were being processed up to, but not including, lease issuance. Now, all lease processing, including technical examinations, environmental analyses and reports, would and did cease, not to be renewed until and unless an ultimate resolution of the underlying litigation occurred, or until a new PEIS analyzing the purported federal coal leasing program was issued and a new federal coal leasing program approved by the Secretary. Even assuming that Western Fuels' and Moon Lake's preference right coal lease applications are granted at some future time under some yet-to-be-determined federal coal leasing program, the completion date for finalization of the processing of the applications is substantially delayed as a result of the District Court's amended order of June 14, 1978. Western Fuels and Moon Lake were, in effect, relegated to the bottom of the pile.

This delay has already severely impacted the interests of Western Fuels. It has been forced to seek alternate and more expensive coal to supply on schedule the needs of the consumer and municipally-owned electric utilities which are its members. Further, these expected delays have placed restrictions on Western Fuels' ability to place orders for necessary mining equipment, some of which has a 3½ lead time for fabrication and delivery.

Moon Lake is similarly impacted by the June 14, 1978 order. First, although coal will not be needed to be mined until 1982 or 1983, it is imperative that Moon Lake have coal under lease in order to develop a logical

mining unit for obtaining the coal. Second, it is necessary that the federal coal be under lease so that a long term financing package for its electric generating plant can be put together. Third, as a result of the delay, Moon Lake is currently being forced to investigate other coal sources to supply its needs. It is anticipated that the cost of the alternate coal will be higher than the cost of producing coal under Moon Lake's preference right coal lease applications.

As soon as Western Fuels and Moon Lake learned of this, for them, disastrous turn of events which the Interior's reversal of position had brought about, they sought to protect their interests as preference right coal lease applicants.

On March 3, 1978, NRDC and the Secretary jointly moved the District Court under Rule 60(b) of the Federal Rules of Civil Procedure to advise the D.C. Circuit that upon remand for that purpose, the District Court would modify its September 27, 1977 injunction as agreed upon in the February 25, 1978 stipulation and agreement.

On March 13, 1978, Western Fuels and Moon Lake filed a motion to intervene as defendants before the District Court.

On March 28, 1978, the District Court dismissed Western Fuels' and Moon Lake's intervention motion solely on jurisdictional grounds, stating:

> "We cannot consider the instant motion unless the action is remanded, at which point they may be renewed. *See Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904, —— U.S. App. D.C. —— (1977)." (A. 1a).

This, of course, thrust Western Fuels and Moon Lake into a classic Catch-22 situation. If the District Court could not consider their intervention petition until after the Court of Appeals remanded and at the same time, the District Court granted the 60(b) motion, the District Court was obviously not going to afford Western Fuels and Moon Lake any relief on remand from the Court of Appeals unless the Court of Appeals itself were to allow intervention. In an effort to obtain their rights to be heard by the District Court before that Court gave its imprimatur to the Interior-NRDC plan to amend the September 27, 1977 order, on March 31, 1978, Western Fuels and Moon Lake filed their notice of appeal of the District Court's March 28, 1978 order. And, on the same day, Western Fuels and Moon Lake filed a Petition for Writ of Mandamus seeking an order from the D.C. Circuit compelling the District Court to exercise its jurisdiction to decide their motion to intervene on its merits. That Petition for Writ of Mandamus was denied on the same day within two hours after its filing. (A. 2a) Thus, the Court of Appeals at that point made certain that Western Fuels and Moon Lake could not escape the Catch-22 fashioned by the District Court's denial of intervention on procedural grounds.

In a further effort to protect themselves, on April 7, 1978, Western Fuels and Moon Lake renewed and reinstated their motion to intervene before the District Court with such renewal to be effective when and if the D.C. Circuit remanded the underlying case to the District Court so that the District Court could modify its order pursuant to Rule 60(b).

Finally, on April 17, 1978, Western Fuels and Moon Lake filed a motion to intervene directly with the D.C.

Circuit in the currently pending appeals denominated *Hughes, et al.* v. *Natural Resources Defense Council, Inc., et al.*, Nos. 77-2090, 77-2096.

On May 19, 1978, the D.C. Circuit denied Western Fuels' and Moon Lake's motion to intervene directly into the underlying case at the appellate level. (A. 3a-6a). Further, on May 19, 1978, the D.C. Circuit affirmed the District Court's March 28, 1978 order dismissing Western Fuels' and Moon Lake's motion to intervene below.

On June 14, 1978, with the case fully before it on remand from the D.C. Circuit, the District Court entered its amended order substantially as requested by NRDC and the Secretary. (A. 39a-45a). Further, on June 14, 1978, the District Court denied Western Fuels' and Moon Lake's renewed motion to intervene before the District Court. (A. 7a).

On August 10, 1978, Western Fuels and Moon Lake filed their notice of appeal from the District Court's June 14, 1978 order denying their renewed motion to intervene. On August 25, 1978, the D.C. Circuit entered an order, *inter alia,* requiring Western Fuels and Moon Lake to show cause "why the order of the District Court should not be summarily affirmed on the ground of untimeliness." Subsequent to Western Fuels' and Moon Lake's response, the D.C. Circuit, on September 20, 1978, in a *per curiam* order affirmed the District Court's June 14, 1978 denial of Western Fuels' and Moon Lake's motions to intervene. (A. 8a-10a).

Notwithstanding its recognition of Western Fuels' and Moon Lake's contention that they sought to intervene only to correct the June 14, 1978, modifications of the injunction without relitigating previously settled issues (A. 9a), the D.C. Circuit refused to disturb

the District Court's denial of intervention. The only ground recited by the D.C. Circuit was "the merits of the original and the modified injunction are considerably intertwined." (A. 9a).

As the basis for that conclusion the D.C. Circuit offered only a footnote reference to a footnote in its memorandum order of May 19, 1978 (A. 9a) denying petitioners' attempt to intervene directly at the appellate level.

Whatever the accuracy of the May 19, 1978 footnote characterization of petitioners' argument, to-wit, that the crux of their argument was an "alleged non-discretionary mandatory duty to issue a lease" (A. 5a), the fact of the matter is that in the appeal which is the subject of petitioners' attempt to obtain review in this Court, petitioners made it abundantly clear (and the court below recognized) that they sought to intervene only to oppose the restriction upon *processing* their preference right lease applications *and for no other purpose.*

That single issue is in no way intertwined with any issue dealt with in the District Court's September 27, 1977 injunction. As already shown, the Secretary himself had read that injunction as not precluding processing of petitioners' applications and the Secretary actively continued to process them and stopped only when he changed positions on February 25, 1978, by agreeing to join in a request to the District Court to modify the September 1977 injunction to preclude further such processing.

What the Secretary did, in sum, so far as here material, was to seek a further order from the District Court, under the guise of a Rule 60(b) motion, adding

to the restraints imposed upon him in September of 1977. This attempt, of course, was outside the realm of Rule 60 and constitutes an attempt, not to relieve the Secretary of the effects of the injunction—the only possible theory upon which a post-judgment motion under Rule 60 could be entertained—but to add new restraints.

REASONS FOR GRANTING THE WRIT

Admittedly, Western Fuels and Moon Lake, petitioners here, carry a heavy burden since the basis for their claim of error arises from a denial of intervention into a lawsuit in which judgment had been entered at the time intervention was sought. However, as above discussed, the procedural history of this case and the vacillating federal involvement in it call for review by this Court.

Specifically, this case presents the Court with a novel question concerning the requirement of timely application for intervention under Rule 24 of the Federal Rules of Civil Procedure, where a *federal defendant, i.e.* the Secretary, whose normal role is to defend his actions upon which third parties have relied suddenly abandons his legal position and instead supports the position of an opponent, under circumstances where that change in position adversely affects the interests of third parties who were previously not involved in the litigation. Further, the denial of intervention by both courts below is in conflict with principles established by this Court, is in conflict with principles utilized in other Circuit Courts of Appeal and is in conflict with principles utilized in the D.C. Circuit itself which is the court below.

This Court has, on several occasions, exercised its supervision over the administration of the Federal Rules of Civil Procedure, by reviewing and, where necessary, correcting misinterpretations by lower federal courts. *See, e.g., Hanna* v. *Plumer,* 380 U.S. 460, 463 (1965); *Schlagenhauf* v. *Holder,* 379 U.S. 104, 109 (1964); *Hickman* v. *Taylor,* 329 U.S. 495 (1947). Indeed, this Court has determined issues under Rule 24 of the Federal Rules of Civil Procedure on several occasions. *See, e.g., United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977); *NAACP* v. *New York,* 413 U.S. 345 (1973); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967). Review is also appropriate here to reconsider and review the principle of timeliness of intervention under Rule 24.

Petitioners' motions to intervene were timely filed both under this Court's decisions and that of various Circuits. Before undertaking a review of the case below, petitioners point out that the procedural box in which they found themselves as a result of the Secretary's retreat from his litigation stance is not unique, but can be a constantly recurring phenomenon wherever the federal finger touches private actions. Thus, review is proper.

Particularly in the area of natural resource development, private parties are substantially dependent upon federal assistance or upon a variety of federal authorizations. The federal action can take the form of the granting of permits or licenses, direct or indirect federal financial assistance, or as in this instance, the granting of leases. Where federal activity is involved, the private party, such as petitioners here, must rely heavily, if not totally, on the compliance by the relevant

federal agency or department with all applicable statutes, such as NEPA.

In the instant case, Western Fuels and Moon Lake relied on the Secretary to comply with the applicable laws. The Secretary tried, and, in the eyes of the District Court, failed. In response to this failure, or other pressures, the Secretary undertook actions to settle the case by retreating from his legal position and entering into agreements which adversely affect petitioners.

Petitioners concede the right of the Secretary, as a litigant, to compromise and settle litigation and in so doing to abandon legal positions previously held. The decision of a federal agency to alter a litigation stance may be due to a change in policy, a change in personnel or a change in national administrations. This is not uncommon. Indeed, this Court noted in a recent decision that the federal parties there before it had "changed positions as nimbly as if dancing a quadrille." *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* —— U.S. ——, 55 L.Ed.2d 460, 477 (April 3, 1978).

However, where third parties' rights are adversely affected by the federal agency's compromise and settlement of a lawsuit, those third parties must be permitted, through their own actions, to protect rights which were formerly protected by the federal agency. The means of protection is intervention into the litigation under Rule 24 to fill the void left by the retreating federal litigant.

The requirement of timeliness of the application for intervention must, in such situations, be judged *not* from time frame of the institution of litigation, but rather from the time frame of the abandonment by the

federal party of its legal position. Judged by these standards, Western Fuels' and Moon Lake's petition to intervene must be deemed timely.

A chaotic situation would arise if interventions were deemed untimely if filed after federal defendants abandon their legal position. Innumerable intervention motions would inevitably be filed by private parties at the *initiation* of litigation involving federal defendants where the private parties normally would not intervene. These interventions would be undertaken solely to assure that private parties could participate in litigation at all stages regardless of the litigation stance of the federal defendants. *See Stallworth* v. *Monsanto,* 558 F.2d 257, 264-65 (5th Cir. 1977). Such premature and wholesale entry into the judicial arena is not justified by the letter or the spirit of Rule 24 of the Federal Rules of Civil Procedure, and this Court should not countenance practices which force it.

As for the case law, the decisions below are in conflict with decisions of this Court, decisions of other Circuit Courts of Appeals and decisions of the D.C. Circuit itself.

In *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), a group of stewardesses whose employment was terminated by United pursuant to United's "no-marriage rule" filed suit against the airline. A class certification was sought but denied by the District Court, however, the District Court did allow twelve stewardesses to intervene as additional parties plaintiff. 432 U.S. at 387-88. An interlocutory appeal of that adverse class determination was declined by the Seventh Circuit. *Id.*

The original and intervening plaintiffs ultimately prevailed in the District Court and were awarded back pay. No doubt owing to the success of their case, the plaintiffs in the District Court did not appeal the denial of class certification.

The respondent in *United* was a putative member of the class for which certification was sought. As soon as she learned of the intention of the plaintiffs not to appeal the denial of class certification, she filed a motion to intervene at the District Court within 18 days of the final order, for the purpose of appealing the adverse decision on class certification. The District Court, pointing out that the litigation had commenced five years earlier found the petition to intervene untimely. The Seventh Circuit reversed and this Court granted the petition for writ of certiorari filed by United. *Id.* at 389-391.

The sole question before this Court was the timeliness of the motion to intervene filed below. This Court affirmed the Seventh Circuit's determination that the petition for intervention had been timely filed in large part since the applicant for intervention had no reason to file the petition until *after* it was learned that the plaintiffs did not intend to appeal the adverse class determination.[8] This Court stated:

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to

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[8] As a result of that intervention, the intervenor prosecuted the denial of class certification and prevailed before the Seventh Circuit with the result that a large class of former stewardesses was certified. *McDonald* v. *United Airlines, Inc.,* Nos. 78-1699, 78-2035 (7th Cir., Nov. 21, 1978).

enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.

United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiffs. And it would be circular to argue than an unnamed member of the putative class was not a proper party to appeal, on the ground that her interests had been adversely determined in the trial court. United was put on notice by the filing of the Romasanta complaint of the possibility of class-wide liability, and there is no reason why Mrs. McDonald's pursuit of that claim should not be considered timely under the circumstances here presented.

Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal. The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment. 432 U.S. at 394-396 (footnotes and citations omitted).

It is clear that under *United,* Western Fuels' and Moon Lake's motion was timely. Western Fuels and Moon Lake had relied upon the Secretary in the underlying litigation. Sixteen days after learning that the Secretary had agreed to withdraw his appeal and support NRDC's legal position, Western Fuels and Moon Lake filed their intervention papers and substantive pleadings before the District Court. Thus, as soon as Western Fuels and Moon Lake discovered that their interests were no longer represented by the Secretary

and, indeed, that the Secretary had taken actions which resulted in additional burdens being placed on Western Fuels and Moon Lake, they acted to protect their own interests. Those actions have been thwarted by the District Court and by the D.C. Circuit.

The decisions below are also in conflict with decisions in at least two Circuit Courts of Appeals, the Seventh and the Fifth.

United was an affirmance of a Seventh Circuit *per curiam* decision, *Romasanta* v. *United Airlines, Inc.,* 537 F.2d 915 (7th Cir. 1976), the reasoning of which parallels that of this Court and will not be discussed in detail here. Suffice it to say that the Seventh Circuit found that the petition to intervene was timely despite the fact that it was filed after the final decision in the case. Further, it is clear that the Seventh Circuit determined that it was timely filed since the applicant for intervention properly relied on representation by other parties and thus delayed the filing of the petition. *Id.* at 918. It was the passage of time from the collapse of that representation which is determinative of the timeliness of a petition to intervene.

The Fifth Circuit, in *Stallworth* v. *Monsanto Co.,* 558 F.2d 257 (5th Cir. 1977), allowed intervention in a case where the petitions were filed on April 4, 1975, two years after initiation of the lawsuit and a month after settlement. The petitions were found to be timely filed since, in the estimation of the Fifth Circuit, one of the critical timing factors was,

> The length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene." *Id.* at 264.

The Fifth Circuit subscribed to this Court's analysis in *United Airlines, Inc.* v. *McDonald, supra,* in concluding that a critical factor in determining timeliness is the date at which the applicant for intervention became aware that the parties in the litigation no longer represented the applicant's interest. 558 F.2d at 264.

Petitioners observe, further, that the decisions below conflict with other decisions of the D.C. Circuit itself. In *Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977), certain environmental groups sued the Administrator of the Environmental Protection Agency, alleging violations of the 1972 Amendments to the Federal Water Pollution Control Act.[9] The District Court dismissed the complaint but that dismissal was reversed on appeal. Subsequent to the remand to the District Court the parties entered into settlement negotiations. On the verge of settlement, two industry groups sought intervention before the District Court in order to participate in the implemention of the settlement arrangements. 561 F.2d at 906-908. The District Court denied the motions to intervene. That decision was reversed with the D.C. Circuit holding, *inter alia,* that the motions to intervene had been timely filed. *Id.* The purpose for the industry groups' intervention arose when the settlement agreement was reached. The motions to intervene, being limited to participation in those arrangements, were thus timely.

In the instant situation the necessity for intervention arose only after the Secretary and NRDC had reached their stipulated agreement. At that point it became

[9] 33 U.S.C. §§ 1251, *et seq.*

necessary for Western Fuels and Moon Lake to intervene to protect their interests as those interests were threatened by the joint action undertaken by the Secretary and NRDC. *See also, Hodgson* v. *United Mine Workers of America,* 473 F.2d 118 (D.C. Cir. 1972) (intervention permitted seven years after case filed).

Moreover, it is plain that in prescribing any limits on the *processing* of preference right lease applications (as distinguished from lease issuance) the District Court's amended order of June 4, 1978, is invalid on its face. The underlying litigation, it must be kept in mind, is a NEPA case. Plaintiffs' claim, reduced to its essence, is that without a proper EIS, the Secretary was going to resume coal leasing in violation of Section 102 of NEPA (42 U.S.C. § 4332). This Court has made clear beyond peradventure the limits of judicial intervention permitted by NEPA. The judicial intervention is solely to prohibit agency action until NEPA is complied with. *See Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976). In terms of the federal coal leasing statutes, that agency action is the act of issuing a lease. Preliminary steps, short of leasing, within the Department of the Interior are not prohibited by NEPA and cannot give rise to claims of legal injury to plaintiffs. The "processing" within the Department of the Interior of a lease application, and the undertaking of site-specific examination and EIS preparation are simply internal steps in the evolution of an adequate EIS. It is not the business of the courts to insinuate themselves into the scheduling of such matters within the Interior Department. Nor can the Secretary, by inviting the courts to order him how to schedule the internal business of the

Department, confer such non-judicial power on the courts in NEPA litigation.[10]

In sum, that portion of the amended injunction asserts a judicial right to control not external action by the Secretary which affects the quality of the human environment but the internal workings of the Department.

Western Fuels and Moon Lake urge the Court to review and correct misapplication of the provisions of Rule 24 by the Courts below in order to clarify the requirement of timeliness of petitions to intervene under that rule, particularly where a federal litigant is involved which represents the interests of private third parties.

[10] However, the Secretary's action (with or without the enthusiastic assistance of plaintiffs) in placing Western Fuels' and Moon Lake's preference right lease applications at the bottom of the pile may well present a question going to whether Western Fuels and Moon Lake have rights to have their applications processed (to a point where they are ready for action when the NEPA issues are resolved) with reasonable dispatch. That question, however, is not a matter of any legal concern to plaintiffs in the context of challenging Interior's coal programmatic EIS under NEPA and it was neither before the courts below nor is it before this Court in this litigation.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed March 28, 1978

Civ. No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Plaintiffs

v.

ROYSTON C. HUGHES, ET AL., *Defendants*
UTAH POWER & LIGHT CO., *Intervenor-Defendant*

ORDER

Western Fuels Association, Inc. and Moon Lake Electric Association, Inc., by joint motion, and Chaco Energy Co., by separate motion, have moved to intervene in this action, jurisdiction over which presently rests with the United States Court of Appeals for the District of Columbia Circuit. That Court has stayed appellate proceedings while we consider whether to approve a proposed modification of our Order of September 27, 1977. Fed. R. Civ. P. 60(b); *see Smith* v. *Pollin*, 194 F.2d 349, 90 U.S. App. D.C. 178 (1952). We cannot consider the instant motions unless the action is remanded, at which point they may be renewed. *See Natural Resources Defense Council* v. *Costle*, 561 F.2d 904, —— U.S. App. D.C. —— (1977). Accordingly, it is by the Court this 28th day of March, 1978,

ORDERED, that the motions to intervene of Western Fuels Association, Inc. and Moon Lake Electric Association, Inc., and Chaco Energy Co., be, and hereby are dismissed.

/s/ J. H. PRATT
John H. Pratt
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1977

No. 78-1292

IN RE WESTERN FUELS ASSOCIATION, INC. and MOON LAKE ELECTRIC ASSOCIATION, INC. *Petitioners*

BEFORE: WRIGHT; Chief Judge and ROBB; Circuit Judge

ORDER

On consideration of petitioners' petition for *writ of mandamus*, it is

ORDERED by the Court that petitioners' aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

/s/ By: DANIEL M. CATHEY
Daniel M. Cathey
First Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 19

No. 77-2090

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

v.

ROYSTON C. HUGHES, in his official capacity as Assistant Secretary of the Department of the Interior for Program Development and Budget, *et al.*

UTAH POWER & LIGHT COMPANY, *Appellant*

No. 77-2096

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

v.

ROYSTON C. HUGHES, in his official capacity as Assistant Secretary of the Department of the Interior for Program Development and Budget, ET AL.

CECIL D. ANDRUS, Secretary of the Interior, ET AL., *Appellants*

No. 78-1403

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ENVIRONMENTAL DEFENSE FUND, INC.,
NORTHERN PLAINS RESOURCE COUNCIL,
POWDER RIVER BASIN RESOURCES COUNCIL

v.

ROYSTON C. HUGHES, in his official capacity as Assistant Secretary of the Department of the Interior for Program Development and Budget, ET AL.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 77-2090, 77-2096 & 78-1403

PROGRAM DEVELOPMENT AND BUDGET

WESTERN FUELS ASSOCIATION, INC., and
MOON LAKE ELECTRIC ASSOCIATION, INC., *Appellants*

BEFORE: WRIGHT, Chief Judge; McGOWAN, Circuit Judge

ORDER

The District Court has previously denied similar applications to intervene in this case by Energy Fuels Corp. and Colorado Westmoreland, Inc.; this Court affirmed those denials and denied a parallel motion by Colorado Westmoreland, Inc. to intervene on appeal.[1] Like those applicant-intervenors, these appellants seek to intervene to raise issues which have previously been decided, with serious prejudice to the present parties to the suit.[2] Appellants'

[1] Order and Memorandum of February 21, 1978 in Nos. 78-1045 and 77-2094; Order of April 13, 1978 in Nos. 77-2090 and 77-2096.

[2] See Memorandum, *supra* note 2, comparing *NAACP* v *New York*, 413, U.S. 345, 367 (1973) with *NRDC* v *Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). Appellants contend they do not challenge the District Court's Order of September 27, 1977, since they ostensibly do not contest restraints on issuance of leases, only restraints on processing of applications. Memorandum in Support of Intervention at 28-30. However, the crux of the arguments they seek to raise by intervening concern the alleged "non-discretionary, mandatory duty to issue a lease," Memorandum in opposition to Remand at 28. Those arguments would reopen the validity of the September 27 order, as the District Court noted and Utah Power and Light conceded. Tr. of Hearing of April 3, 1978, at 59. Thus, intervention by appellants would reopen a key matter which has been previously litigated and decided.

rights are substantially protected by the participation of Utah Power and Light in the suit, since it, like them, is a prospective preference right lessee, and it has raised arguments virtually identical to theirs.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

No. 77-2090, 77-2096 & 78-1403

On consideration of the foregoing, of appellants' appeal in No. 78-1403 and their motions[3] to intervene in Nos. 77-2090 and 77-2096, the opposition thereto, and the record in these cases, it is

ORDERED by the Court that the motions for leave to intervene in Nos. 77-2090 and 77-2096 are denied; and, it is

FURTHER ORDERED by the Court that the order of the District Court denying intervention on appeal in No. 78-1403 be, and the same hereby is, affirmed.

The Clerk is directed to transmit a certified copy of this order to the District Court as promptly as the business of his office permits.

SO ORDERED

[3] Identical motions were filed on appeal and lodged with the District Court.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Plaintiffs,

v.

ROYSTON C. HUGHES ET AL.,
UTAH POWER AND LIGHT COMPANY, *Defendant.*

MEMORANDUM ORDER

Upon consideration of the reinstated petitions to intervene in this action filed by Western Fuels Association, Inc., Moon Lake Electric Association, Inc., and Chaco Energy Company, and for the reasons given in the Statement of Reasons Pursuant to Order of Remand filed this day, in the Court of Appeals Order of May 19, 1978 with respect to two of the prospective intervenors here, and in the dispositions by this Court and the Court of Appeals of previous petitions to intervene herein, it is by the Court this 14th day of June, 1978,

ORDERED, that the motion to intervene of Western Fuels Association, Inc. and Moon Lake Electric Association, Inc., be, and hereby is, denied; and it is further

ORDERED, that the motion to intervene of Chaco Energy Company be, and hereby is, denied.

/s/ J. H. PRATT
John H. Pratt
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1978

Civil Action No. 75-1749

No. 78-1664

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

v.

ROY C. HUGHES, in his official capacity as Assistant Secretary of the Department of the Interior for Program Development and Budget, ET AL.

CITY OF SAN ANTONIO, TEXAS, acting by and through the City Public Service Board of San Antonio, *Appellant*

And Consolidated Case Nos. 78-1710 and 78-1780

BEFORE: McGOWAN and TAMM, Circuit Judges

ORDER

On consideration of the responses to the orders to show cause filed herein, of the motion of City of San Antonio, Texas, for leave to intervene, of the record on appeal herein, and for the reasons set forth in the attached memorandum, it is

ORDERED by the Court that the motion of City of San Antonio, Texas for leave to intervene is denied, and, it is

FURTHER ORDERED by the Court that the orders of the District Court on appeal herein be, and the same hereby are, affirmed. It is

FURTHER ORDERED by the Court, *sua sponte*, that the consolidation of the above cases with No. 78-1656 is hereby vacated.

Per Curiam

MEMORANDUM

This Court has upheld the District Court's denials of intervention in the case of *NRDC* v. *Hughes* four times.[1] Appellants in that case thus face the double burden of persuading this Court that its previous four orders are distinguishable, and that the District Court erred. This burden has not been overcome.

Under Rule, 24, F.R.Civ.P., intervention must be timely, and the District Court's determination concerning timeliness will not be upset absent abuse of discretion. *NAACP* v. *New York*, 413 U.S. 345, 366 (1973); *NRDC* v. *Costle*, 561 F.2d 904, 907 (D.C. Cir. 1977). Motions to intervene at a late point in a suit, after the existing parties to it have briefed or settled important issues, or the Court has decided such issues, may be deemed untimely. *NAACP* v. *New York; Moten* v. *Bricklayers, Masons and Plasterers Int'l Union*, 543 F.2d 224, 228 (D.C. Cir. 1976). Western Fuels Association, Inc., Moon Lake Electric Association, Inc., and Chaco Energy Company, which seek to intervene three years after this suit began, contend the District Court abused its discretion in denying intervention because, most recently, they sought only to contest the modification of the injunction late in the case without reopening previously settled issues. From our examination of the full record in the case, we find that the merits of the original and the modified injunction are considerably intertwined, as our previous orders have recognized[2]; it was not an abuse of discretion for the District Court to conclude that late intervention would reopen prior decisions on key issues to the prejudice of existing parties to the suit.

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[1] Order and Memorandum of Feb. 21, 1978, in Nos. 77-2094 and 78-2045; Order of March 31 in No. 78-1292; Order of April 13 in Nos. 77-2090 and 77-2096; Order and Memorandum of May 19 in Nos. 77-2090, 77-2096 and 78-1403. We will not repeat here the full discussion, with which we agree, in the earlier memoranda.

[2] Memorandum of May 19, at 2 n.2.

The City of San Antonio sought to intervene late to secure a favorable interpretation of one provision of the injunction. Denial of late intervention was not improper in light of the assurances concerning interpretation of that provision provided by the federal defendants in the case.

In *NRDC* v. *Berklund*, No. 78-1063, Intermountain Power Project (IPP) sought to intervene two and a half years after the suit began. For the reasons expressed in our orders in *NRDC* v. *Hughes*, denial of late intervention was not an abuse of discretion, particularly considering the vigorous representation in *Berklund* provided by Utah Power and Light Company. See IPP Brief on Appeal at 12; Brief for Appellee Berklund at 9; Brief for NRDC at 16-17 n.1.

The orders of the District Court denying intervention are affirmed, and intervention on appeal is denied.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL ET AL., *Plaintiffs*,

v.

ROYSTON C. HUGHES ET AL., *Defendants*.

MEMORANDUM OPINION

Introduction

Plaintiffs in this action seek declaratory and injunctive relief to restrain defendants from further implementation of a new Federal Coal Leasing Program, and from entering into any coal leases unless and until defendants comply with their statutory obligations under § 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1970), *as amended*, Act of Aug. 9, 1975, Pub. L. No. 94-93, § 1, 89 Stat. 424.

Plaintiffs allege that if the new Federal Coal Leasing Program is fully implemented they and their members will suffer irreparable injury in the form of, *inter alia*, destruction of land by strip mining, threats of pollution to ground and stream water, and harm to animals, crops, and vegetation from air pollution. It is further alleged that the environmental degradation which will occur from the implementation of the program was not adequately reflected in the Program's Environmental Impact Statement as required by § 102 of NEPA.

This case is before the Court on cross-motions for summary judgment. Upon consideration of the full record herein, we hold that plaintiffs are entitled to summary judgment. The material facts are not in dispute.

A. PARTIES.

Plaintiffs Natural Resources Defense Council, Inc. (NRDC), Environmental Defense Fund, Inc. (EDF), Northern Plains Resource Council (NPRC), and Powder River Basin Resource Council (PRBRC), are non-profit membership corporations. Each plaintiff was formed, *inter alia*, for the purpose of promoting the conservation and the protection of the natural resources of the public lands and minerals.

(1) Defendant Robert Mendelsohn, Assistant Secretary Designate of the Department of the Interior for Policy, Budget, and Administration, serves a staff function to the Secretary in making decisions relating to the implementation of the Department's coal leasing program.[1] The Assistant Secretary reviews and endorses all draft and final Environmental Impact Statements (EIS) for the Department.

(2) Defendant Cecil Andrus is Secretary of the Interior.

(3) Defendant Curtis J. Berklund is the Director of the Bureau of Land Management (BLM) of the Department of the Interior and has been delegated authority by the Secretary of the Interior for the conduct, operation and activities of said Bureau, including implementation of the Department's coal leasing program.

(4) Intervenor-Defendant Utah Power and Light Company is the principal electric public utility in the State of Utah.

B. COAL RESERVES.

The United States contains an estimated 1.58 trillion tons of identified coal reserves approximately one half of

[1] Pursuant to Fed. R. Civ. P. 25(d) the successors to the original federal defendants have been automatically substituted as parties to this action.

which are located in the western United States. The federal government owns approximately 60% of the western coal resource. Most of the large coal resource in the eastern and midwestern United States is privately owned.

Federal coal has, however, played a minimal role in total U.S. production. In 1960 federal coal accounted for only 1.3% of the total coal mined. This mining share has increased only slightly to its current level approximating 3%.

C. FEDERAL COAL LEASING POLICY PRIOR TO 1973.

The Department of the Interior has general authority to manage public lands of the United States,[2] and the responsibility to provide for the orderly development of the nation's mineral resources,[3] including coal resources. Historically, and until 1970, the coal leasing policy of the federal defendants was reactive in nature, responding to lease requests on a case-by-case basis without regard to the total reserves under lease or the need for additional leasing, and without an assessment of the environmental impacts of leasing.[4]

[2] 18 Stat. 317 (1875), 43 U.S.C. § 2; 60 Stat. 1100 (1946), 43 U.S.C. § 1201.

[3] The Mineral Lands Leasing Act of 1920, c. 85 § 1, 30 U.S.C. § 181 (1970), *as amended*, Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976).

[4] Prior to 1970 there were two ways for private parties to gain access to federal coal under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 *et seq.* (1970). The first was by competitive bidding, in areas where coal was known to exist in workable quantities. If the existence or workability of coal was not known, however, the federal defendants could issue a prospecting permit authorizing exploration. If the permittee discovered coal in commercial quantities, he could apply for a "preference right" lease under 30 U.S.C. § 201(b). This section of the Act granting "preference right" leases has recently been repealed. Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 74-377, § 4, 90 Stat. 1085 (1976).

In 1970, the Department of the Interior imposed a moratorium on coal leases and prospecting permits. This action resulted from a Bureau of Land Management coal lease study which discovered a sharp increase in the total federal acreage under lease and a consistent decline in coal production. *See* Holdings and Development of Federal Coal Leases, Division of Minerals, Bureau of Land Management, November 1970.

From 1945 to 1970, the number of acres of federal land leased for coal development *increased* from about 80,000 to approximately 778,000, almost a ten-fold increase. In the same period, annual coal production from these federal lands *declined* from about 10 million tons in 1945 to approximately 7.4 million tons in 1970. These leased areas contain an estimated 16 billion tons of coal reserves, 10.6 billion of which are mineable by strip mining. An additional 10 billion tons are potentially recoverable from federal acreage for which "preference right" applications for coal leases have been filed.[5] The additional ten billion tons include quantities of coal which, due to the size of the lease unit, location, or transportation costs, may not be economically recoverable.

D. EVOLUTION OF THE CURRENT FEDERAL COAL LEASING POLICY

In February 1973, the Secretary of the Interior announced a new coal leasing policy. The policy embodied short-term and long-term actions. The long-term policy consisted of the formulation of a planning system to determine the size, timing, and location of future coal leases, and the preparation of an environmental impact statement with respect to

[5] The recent legislation which repealed the Interior Department's authority to grant "preference right" leases under 30 U.S.C. § 201(b), did so "subject to valid existing rights." Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, § 4, 90 Stat. 1085 (1976).

the entire federal coal leasing program.[6] The short-term action included a complete moratorium on the issuance of new prospecting permits, and a near-total moratorium on the issuance of new federal coal leases. Respecting the latter, new leases would be issued only to maintain existing mines or to supply reserves for production in the near future.[7]

In October 1973, the Director of BLM established a schedule for the implementation of a new coal leasing system entitled Energy Minerals *Allocation* Recommendation System (EMARS).[8] The purpose of this new system was to allow

[6] It is noteworthy that the programmatic impact statement prepared for the new coal leasing policy was the first of its kind undertaken by the Department. (Turcott Aff. p. 1). A programmatic statement is one which considers the aggregate effects of a broad federal policy. This is to be distinguished from a regional impact statement or a site-specific statement both of which are designed to assess the environmental impact of individual projects or project areas.

[7] On July 6, 1973, the BLM issued implementing instructions for the Secretary's short-term leasing criteria. (L.M. 73-231). In pertinent part the instructions state that "the decision [to issue leases] would be based upon sufficient indications that the appellant needs coal to satisfy an existing market and intends to begin development within three years." Id. at § B5. As noted *infra*, at p. 8, these criteria have been superseded by the new short-term standards issued on July 25, 1977.

[8] As described in the draft EIS, EMARS was basically a three-part system: (1) allocation, (2) tract selection, and (3) leasing. During the *allocation* process federal agencies related inventoried federal coal resources to projections of coal-derived energy needs. Total national energy needs were disaggregated into regional demands for coal derived BTU's. In the *tract selection* phase, federal coal leasing targets were then established in each region or area, flowing from the total national projections for coal based energy needs. The *leasing phase* was to begin with a detailed preplanning of the coordinated mining and rehabilitation factors required for reclamation and subsequent surface resource management. This phase would conclude with (A) pre-sale evaluations, (B) lease sales, (C) post sale evaluation procedures, and (D) lease issuance. (Pl. Ex. 1, pp. I-2 - I-5).

the Interior Department to resume the issuance of federal coal leases by providing a mechanism for shifting to an environmentally acceptable coal leasing program.

In May 1974, approximately seven months after the announcement of the proposed leasing program, the *draft* programmatic environmental impact statement (DEIS) was filed by the Interior Department with the Council on Environmental Quality [9] (CEQ).

The release of the DEIS was followed by four months of public commentary during which five open hearings were held throughout the country. Approximately seven hundred pages of suggestions and criticism were received by the Department of the Interior. Among those comments were requests by the CEQ and the Environmental Protection Agency (EPA) that a new draft EIS be prepared.[10]

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[9] A few days *prior* to the release of the DEIS, previous federal defendant Hughes, then Assistant Secretary for Program Development and Budget, wrote to the Under Secretary of the Interior Department that he (Hughes) had reluctantly released the DEIS despite the fact that it had "major weaknesses." Defendant Hughes anticipated "heavy criticism" of the DEIS on several grounds:

(1) The BLM's Management Framework Planning System —"the heart of the decision-making process"—was not well explained;

(2) The description of EMARS was out of date, and did not adequately explain the nominations process. Further, the alternatives to EMARS as a decision making process were not discussed;

(3) The pertinent BLM regulations and the new geological survey coal regulations were not fully considered;

(4) Several major points of policy such as "perference right" leasing, diligence requirements, possible limitation on development of old lease, public notice of proposed actions, and the alternatives to these, were not sufficiently analyzed. (Pl. Ex. 4).

[10] The CEQ concluded in its September 6, 1974 letter to Secretary Morton, "You and your staff, the President, Congress, other agencies and the public need the best possible information on which to formulate intelligent policy decisions on a program of such importance to the nation. An adequate program environmental impact statement can, at least in part, serve this purpose. *Unfortunately, the informational and analytical deficiencies of the current draft EIS prevent it from doing so.* (Emphasis added). We believe, therefore, that a new draft environmental impact statement is necessary." (Pl Ex. 2, pp. 9-24).

The EPA concurred in its September 1974 commentary addressed to Mr. Berklund, Director of BLM, stating:

"We believe that the policies which are developed by the Department of the Interior to manage coal lands and resources are of paramount importance to the environment. The environmental impact statement (EIS) should describe clearly the policy alternatives, and analyze their environmental consequences. This EIS fails to specify policy alternatives and only describes environmental consequences of coal mining in general. It therefore fails to meet the criteria of an adequate impact statement. *We strongly recommend the Bureau [of Land Management] evaluate the comments received and re-issue the statement once again as a draft environmntal impact statement.* (Emphasis added).

"In accordance with our procedure of rating environmental impact statements at the draft stage, we are rating this statement as category 3 (inadequate)." (Pl. Ex. 2, pp. 9-25).

[11] For example, the Atomic Energy Commission, in its staff report on the DEIS, dated September 18, 1974, commented:

"Without discounting the considerable effort that was evidently expended to prepare this report, we suggest that it falls far short of its purpose, and that any future proposals to lease federal coal lands will be vulnerable to attack on environmental and conservationist grounds unless a more substantial case can be made." (Pl. Ex. 2, pp. 9-39).

Other federal agencies were almost universally critical of the draft statement.[11]

In September 1975, the *final* programmatic EIS was released with some modifications. Prominent among the amendments were those which changed the Energy Minerals *Allocation* System to an Energy Minerals *Activity* System.

The primary distinction between the first and the second systems is that the *allocation* process emphasized interdepartmental *federal* identification of coal reserves to be considered for leasing, whereas the *activity* system relied almost entirely upon industry and public nominations for the ascertainment of reserve tracts ripe for development.

The Secretary of the Interior, on January 26, 1976, announced the implementation of the new coal leasing policy (the long-term plan) based upon, *inter alia,* adoption of the Energy Minerals *Activity* Recommendation System. The new policy expressly lifted the moratorium on new major federal coal leasing which had been in effect since late 1970. The Secretary announced, however, that the short-term policy would be retained until the new competitive coal leasing system was fully operational.

In February 1976, the Assistant Comptroller General of the United States, Phillip Hughes, testified before the Senate Interior Subcommittee on Minerals, Materials and Fuels on the new coal leasing program. Mr. Hughes pointed out that the GAO had recently completed a study concluding that the *need* for a new federal coal leasing policy had *not* been clearly established, and that if such a need did in fact exist the Interior Department could not, under the new system, effectively administer a coal leasing program. (Pl. Ex. 19, at 2).

On April 1, 1976, the Comptroller General submitted a 70-page report to Congress outlining the deficiencies of the new program as analyzed by GAO.[12]

On May 7, 1976, the Secretary of the Interior issued new regulations which effectively exempted "preference right" lease applications from the short-term criteria. 43 C.F.R.

[12] The Comptroller General recommended:

> ". . . that Interior defer issuing new leases until it has established a workable and effective administrative mechanism for implementing a federal coal-leasing program." (Pl. Ex. 27, at 28, 51, 63).

§ 3521.1 (1977). The effect of these regulations was to confine the Department's short-term criteria to competitive leasing; "preference right" leases could and were issued without reference to the short-term criteria.

The Interior Department on June 1, 1976, issued a call for the nomination of specific federal coal leasing tracts as suitable or unsuitable for federal leasing. Also on that date, final regulations clarifying the procedures for the implementation of EMARS were issued. 43 C.F.R. § 3520 (1976), revised at 42 Fed. Reg. 4,452-57 (1977), (to be codified in 43 C.F.R. § 3525).

The Bureau of Land Management, on August 9, 1976, issued a statement that, pursuant to the nominations process which ended July 31, 1976, coal companies and private individuals had identified 680 tracts in eight states as areas upon which they would bid if offered for federal coal lease.

The Secretary on July 25, 1977 adopted new short-term leasing standards to correct abuses in short-term leasing under previous criteria. Federal Defendants' Memorandum in Response to the Court's July 5, 1977 Request, Appendix IV. These revised standards also would permit the issuance of any "preference right" lease, on an *ad hoc* basis, without limitation, and any competitive lease if,

(1) the lessee controls land which is contiguous to the land to be leased (there is no requirement that there be an existing mine in operation); and

(2) the amount of reserves to be leased does not exceed eight years at contracted for or expected levels of production; and

(3) no new major transportation facilities are to be constructed.

It is plaintiffs' basic contention that defendants' actions as outlined above have been pursued in the absence of an adequate final programmatic EIS and are therefore unlaw-

ful and invalid. We turn now to defendants' response on procedural as well as substantive grounds.

E. THE DEFENDANTS' JURISDICTIONAL CHALLENGE

In their challenge to the jurisdiction of this Court, defendants argue that a recent amendment to the Mineral Leasing Act of 1920 [13] expresses Congressional intent to confirm (or reaffirm) the new Coal Leasing Program and to adopt that program in its present form. Defendants state that Congress' willingness to accept the new program in its current posture renders the issue of the adequacy of the Coal Programmatic EIS moot. This contention is without merit.

After a careful review of the legislative history of the 1975 coal leasing amendments, we are unable to discover any evidence of Congressional intent to exempt the new coal leasing policy from the requirements of NEPA.[14] Without such a showing, the argument of lack of jurisdiction must fail.

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[13] The Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (1976).

[14] In the past, Congress has specifically mooted pending litigation concerning the adequacy of an EIS. During the Trans-Alaska pipeline controversy, the legislature exempted that final EIS from additional judicial review by providing that:

"The actions taken pursuant to this title which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, *shall be taken without further action under the National Environmental Policy Act of 1969 . . .*" (Emphasis added). Trans-Alaska Pipeline Authorization Act, P.L. 93-153, § 203(d), 87 Stat. 576. *See generally* Conf. Rep. No. 93-924, 93d Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2529.

F. THE DEFENDANTS' CLAIM THAT THE CONTROVERSY IS NON-JUSTICIABLE.

Defendants next contend that plaintiffs' challenge to the sufficiency of the final programmatic EIS is non-justicable unless and until the program which is discussed in the EIS is implemented by specific, concrete application. This requires no extended response.

The Supreme Court's observation in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), a case which involved the question whether a regional EIS was required at all rather than the issue of non-justiciability, is relevant to defendants' assertion:

> "The time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption. With the issuance of the final programmatic EIS and the implementation of the new coal leasing policy, this claim that the actions of the defendant have not sufficiently matured is impossible to accept. The issues raised herein are ripe for decision." 427 U.S. at 406 n.15.

The claim that the actions of defendants have not sufficiently matured is impossible to accept. The issues raised herein are clearly justiciable.

G. DUTY TO COMPLY WITH § 102 OF NEPA.

The applicability of NEPA is not an issue in this proceeding. The Interior Department has conceded in this litigation, as well as in recent argument before the Supreme Court, that it was indeed required to prepare the Coal Programmatic EIS under § 102(2)(C) of NEPA.

"Similarly the federal petitioners agreed at oral argument that § 102(2)(C) required the Coal Programmatic EIS that was prepared in tandem with the new national coal leasing program and included as part of the final report on the proposal for adoption of that program. Tr. of Oral Arg. 9. *Their admission is well made, for the new leasing program is a coherent plan of national scope and its adoption surely has significant environmental consequences.*" (emphasis supplied). *Kleppe v. Sierra Club, supra,* at 400.

In view of this concession, it is not necessary to make the threshold determination that the elements which trigger the requirement of an EIS are present under the facts of this case.

H. ADEQUACY OF COMPLIANCE WITH § 102 OF NEPA.

Defendants, on the merits, contend that the final programmatic EIS issued September 19, 1975, complies with the requirements of NEPA. We examine this contention in some detail, starting off with the language of the statutory provision.

In pertinent part, § 102 of NEPA provides that "to the fullest extent possible" all agencies of the Federal Government shall

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

A few observations as to the effect of the statutory obligations and our function as a reviewing court are appropriate at this point.

This provision compels all federal agencies to satisfy its requirements absent clear and unavoidable conflict in statutory authority. *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n,* 426 U.S. 776, 788 (1976). Section 102 duties are not inherently flexible. They must be complied with "to the fullest extent." *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission,* 449 F.2d 1109, 1115 (D.C. Cir. 1971). This is a "high standard . . . which must be rigorously enforced by the reviewing Courts." *Id.*

In performing its function of review, "[t]he Court's task is to determine whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to fully consider and balance the environmental factors." *Concerned About Trident et al. v. Rumsfeld et al.,* 555 F.2d 817, 827 (D.C. Cir. 1976).

Our review is also subject to certain limitations. As the Supreme Court recently pointed out:

"Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. (Citation omitted). The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot

'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " *Kleppe v. Sierra Club, supra,* at 410 n.21.

The determination as to whether, when, and how to lease more federal coal remains largely within the Secretary's discretion. Our sole obligation in this action is to ascertain whether the final programmatic EIS filed herein has satisfied the statutory criteria of NEPA.

Although NEPA merely requires an agency to file a final impact statement, 42 U.S.C. § 102(2)(C), the CEQ has severed the process into two parts, requiring a Draft Environmental Impact Statement (DEIS) and a Final Environmental Impact Statement (EIS). Council on Environmental Quality Guidelines, 40 C.F.R. § 1500.7(a) (1975).

With regard to the DEIS, the Guidelines state:

> Each environmental impact statement shall be prepared and circulated in draft form for comment in accordance with the provisions of these guidelines. *The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirement established for a final statement by section 102(2)(C).* (Emphasis added). 40 C.F.R. § 1500.7 (1975).

Although courts have construed the legal status of these regulations as advisory and not entitled to binding effect, *Hiram Clark Civic Club, Inc. v. Lynn,* 476 F.2d 421, 424 (5th Cir. 1973), it is important to note when considering their weight that the President delegated the authority to the CEQ to issue these guidelines as to the manner of agency compliance with section 102 of NEPA. Exec. Order No. 11514, 3 C.F.R. 1966-70 Comp. P. 902. Both the Department of the Interior and the BLM have promulgated regulations specifically governing the preparation of the draft

statements.[15] In our view, neither the DEIS nor the Final Programmatic EIS complies with these regulations. As has been previously set forth (pp. 5-6 *supra*) the DEIS when released in May 1974 was the object of heavy criticism from various federal agencies, environmental groups, representatives of the coal industry, and even employees of the Interior Department (such as former Assistant Secretary Hughes). (Pl. Ex. 2, at 9-21, 9-92).

The commentary critical of the DEIS was directed more recurrently toward, *inter alia,*

> (a) the inadequacy of the Department's explanation of the EMARS program, and
>
> (b) the paucity of alternatives to the proposed leasing policy (i.e., the Department's insufficient showing that the institution of a national coal leasing program was even necessary).

We believe these comments to be equally applicable to the Final EIS inasmuch as there have been no significant remedial changes in the above two areas nor in numerous other sections of the statements.

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[15] The Department Manual, *supra,* ch. 2, § 9.B(1), 36 Fed. Reg. 19346 (1971), 43 C.F.R. § 516, mandates the draft statement to be "as complete as possible." The BLM manual requires, with greater specificity, that the draft statement be one "analyzing the best information available regarding the possible environmental impacts of an action and all reasonable alternatives." BLM Manual § 1792.05 (D)(1), 37 Fed. Reg. 15016 (1972).

The United States Court of Appeals for the District of Columbia Circuit has most recently held that the promulgation of regulations by the Defense Department implementing NEPA's provisions bound that agency to follow those guidelines. *Concerned About Trident et al., supra,* at 823. The Department of the Interior and BLM, having issued similar regulations, would appear to be bound thereby.

(a) The EMARS System.

The EMARS system, which is the "heart" of the new national coal leasing policy, is set out in only four of the Draft Programmatic's 700 pages. (Pl. Ex. 1, at I-1a - I-4).[16]

In the Final Programmatic EIS, although the length of the EMARS explanation had increased to 11 pages (Pl. Ex. 2, at K-12 - I-23), the original Energy Minerals *Allocation* Recommendation System was substantively changed to the Energy Minerals *Activity* Recommendation System without the proper explanation.[17]

This important amendment substituted a procedure of industry nominations, designed to provide BLM with data as to the location and quantity of coal to be leased, for the original allocation system in which federal agencies related inventoried Federal coal resources to national projections of coal-derived energy needs.[18] While it is outside the scope of our review to consider the respective merits of the two

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[16] In light of the statutory policy that an impact statement should be available for informed public commentary prior to its final release, the EPA observed:

> "The (Draft) impact statement presents no detailed description of EMARS that permits readers to make an informed judgment of its ability to evaluate and integrate critical policy factors." (Pl. Ex. 2, at 9-24).

[17] The Final Statement merely indicated "the description of the proposed EMARS process has been rewritten and expanded to reflect comments and suggestions received." (Pl. Ex. 2, at 9).

[18] In its recent report to Congress on the final coal leasing proposal, the GAO made the following critical comment concerning the second EMARS system:

> "Interior indicates that specifying exact demands on Federal Coal is impossible beyond saying that greater amounts of coal are anticipated to come from federal lands. While exact long-term demands might not be measurable, we believe that Interior should have reasonable goals of how much to lease and when to lease, based on the best possible estimates of how much coal to expect from developing the leases." (Pl. Ex. 27, at 11). Such data is not provided in the Final EIS.

programs, we believe that this amendment constitutes a significant departure from the first EMARS system and, hence, a detailed comparative explanation would be required under NEPA. This was not provided. It is not difficult to conclude that neither the distinction between these two programs, nor the potential ramifications thereof, were adequately considered in the Final EIS. Nor was the public afforded an opportunity to comment upon this substantial modification.

This lack of detailed exploration in the Final Programmatic EIS contravenes (1) the purpose of NEPA as "an environmental full disclosure law," *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2d Cir. 1972), and (2) the statutory requirement of inter-agency and public consultation prior to the release of a Final Impact Statement. 42 U.S.C. § 4332(C).

We hold the Final EIS to be inadequate with regard to the section concerning EMARS. To comply reasonably and in good faith with section 102 of NEPA, the Department of the Interior must expand its EMARS explanation through the issuance of a supplemental draft programmatic statement consistent with the Order attached hereto.

(b) Lack of alternatives to the present policy.

With regard to the alleged inadequate explication of alternatives, it is well settled that NEPA requires an exploration of all reasonable alternatives. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). At the same time, the statute does not impose an obligation to consider every remote possibility. *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975). What is required is information sufficient to permit a reasoned choice of alternatives. *Natural Resources Defense Council, Inc. v. Morton, supra*, at 836.

Two types of alternatives emerge in the factual context of this case and should be considered. The first is *whether*

a new program should be undertaken at all. This is the alternative of "no action." The second is, if such a program is found to be necessary, *what type* of system should be utilized.

Absent from the Draft Programmatic EIS was any mention or consideration of the first alternative of "no action."[19] This is the most significant alternative, since only an adequate explanation for its rejection can provide the new program with its very *raison d'etre*. The detailed consideration of "no action," and its thoughtful rejection by the Department, would have laid the groundwork for the consequent implementation of the new policy. Yet the Draft was silent on this point. Since this option was not included in the DEIS and since a second draft was not issued for comment, the public as well as governmental agencies were deprived of their statutory right to comment thereon. 42 U.S.C. § 4332(C), *supra*.

The Final Statement perfunctorily devoted a few paragraphs to the "no action" alternative. (Pl. Ex. 2, at 8-32). Apparently, the Department and the BLM believed this to be sufficient to fulfill their regulatory obligations which specifically require the consideration of the "no action" alternative.[20] It appears, however, that the Department's treatment of this alternative is sufficient neither under the statute nor under the regulations.

Defendants' position in support of the program, i.e., that because federal coal production is rapidly increasing more federal coal must be leased, is countered by the plaintiffs'

[19] Since the short-term leasing policy, *supra*, was in effect when the new leasing program was adopted, the effect of accepting the "no action" alternative would merely have been to retain the short-term policy.

[20] BLM Manual § 1792.22C(8), 37 Fed. Reg. 15018 (1972); Department of the Interior Manual Part 516, ch. 2, § 6.C(8), 36 Fed. Reg. 19345 (1971).

response that the argument ignores the magnitude of the amount of coal currently under lease. Plaintiffs cite the BLM coal reserve statistics which reveal that approximately 26 billion tons of potentially recoverable federal coal are presently under lease. (Pl. Ex. 2, at 1-84). At the estimated 1985 rate of federal coal production (320 million tons per annum) plaintiffs state that these outstanding leases would provide enough coal for the next 121 years.[21] (*Id.* at 1-84, Table 1-28).

As is noted previously, coal mined on federal lands constitutes only 3% of all coal mined in the United States. Even with a significant increase in production, the BLM figures reveal that the amount of federal coal currently under lease could satisfy such a demand for many decades. Therefore, an anticipated eighteen-month delay in the issuance of major new leases, caused by the issuance of the injunction sought by plaintiffs, (Turcott Aff. § 17), would in our judgment have no significant effect upon the availability of coal in the United States.

In light of these statistics, the threshold question as to *whether* the proposed policy is even *necessary* should have been addressed and considered in depth. The cursory treatment of the "no action" alternative provided in the Final

[21] With regard to this issue, the GAO report, *supra*, stated:

"Presently, the national coal production goal is 1.2 billion tons a year by 1985 which was set by the President in his energy message of January 1975. It should be clear (1) what portion of the projected 1.2 billion tons will have to come from federally owned coal lands and (2) whether Federal coal reserves now under lease or committed to preference right leaseholders can satisfy this need. As of February 1976, Interior did not have the answers to these questions. Consequently, Interior does not have an adequate basis for determining whether additional coal is needed and, if so, how much coal should be leased to meet national production goals." (Pl. Ex. 27, at 10).

EIS does not satisfy the statutory mandate of § 102(C) of NEPA. *See Calvert Cliffs', supra,* at 1114. The Department did not take a "hard look" at this policy option during its decision-making process. The Department must therefore also consider the "no action" alternative in a supplemental draft statement to be issued consistent with the Order attached hereto.

While we have focused specifically upon two deficiencies, our criticism is not confined to those areas. Numerous other aspects of the Final EIS were the topic of agency and public criticism. These areas, such as lack of administrative alternatives to the program and the failure to relate the new program to coal already under lease, shall also be reconsidered by the Department in the supplemental Draft Statement.

To conclude, the environmental consequences of any national coal leasing program cannot be gainsaid and require no elaboration. The program under consideration was the result of a decision apparently made long before and apart from the preparation of the Draft EIS. Because of its inadequacy, both government agencies and the public were deprived of a meaningful opportunity to comment. The Final EIS suffers from similar inadequacies as well as the fact that its finality prevented comment even though the original EMARS, the core of the program, had been drastically changed. The undisputed facts show a clear violation of the letter and purpose of NEPA.

I. THE APPROPRIATENESS OF INJUNCTIVE RELIEF

Defendants state that the issuance of an injunction prohibiting the continuation of the new coal leasing policy will substantially inhibit the development of long-range national energy planning. We can find no evidence in the record to support this allegation.

The criticisms of the new leasing policy submitted by various government agencies directly concerned with the formulation of national energy policy, such as the Atomic Energy Commission, do not allege countervailing circumstances such as the existence or anticipation of a national coal shortage which would be exacerbated by the temporary suspension of the new leasing program. In fact, the Commission suggested major revisions in the proposal before Federal coal lands should be reopened for leasing. (Pl. Ex. 2, at 9-39).

Defendants further argue that regardless of the outcome of the issue of the adequacy of the Final EIS, they may issue leases if a separate impact statement has been prepared for each proposed lease when required by NEPA. As an initial proposition in a different factual setting, this may be true. We are not concerned with individual leases but rather the formulation of a national coal leasing policy. If regional or site-specific EIS's are permitted to act as curative of programmatic deficiencies and as a substitute for a Final EIS, the policy of long-range environmental planning would be defeated.[22] Thus, the filing of separate site-specific EIS's are not a substitute for an adequate final programmatic EIS.

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[22] Defendants also argue that "preference right" lease applications are to be considered on an "ad hoc" basis and hence outside the purview of the National Leasing Program. Therefore, defendants state that such leasing should not be subject to any court order relating to the National Leasing Program. We disagree. After careful review of the record we have determined that when the Final Programmatic EIS was released, "preference right" leases were consistently referred to as a part of the National Program. (Pl. Ex. 2, summary ¶ 2, §§ 1-80, 82-9, 8-32). There is no evidence in the Final Statement or any facts offered by defendants which would lead us to conclude that the "preference right" applications were outside the ambit of the Program. For the purposes of this injunction and compliance with NEPA, "preference right" leasing will also be enjoined until the Programmatic EIS deficiencies are remedied.

Most recently, defendants assert that this case is now moot because of a change in position arising from the President's Environmental Message to Congress of May 23, 1977, directing that federal coal lands be managed in an environmentally sound manner. Defendants indicate that they will comply with NEPA before adopting new policies and procedures in accordance with the President's directive. Federal Defendants' Memorandum in Response to the Court's July 5, 1977 Request. As plaintiffs properly point out, defendants' revised short-term leasing criteria will permit extensive new federal leasing on a large scale during the review and revision of the present national coal leasing program. Plaintiffs' Reply to Federal Defendants' Memorandum in Response to the Court's July 5, 1977 Request. The issues presented herein are not moot.

This Circuit has recently held that when an action is undertaken which violates NEPA, there is a presumption that injunctive relief should be granted against the continuation of the action until the agency complies with the statute. *Realty Income Trust v. Eckerd,* No. 76-1062, slip op. at 17 (D.C. Cir. June 29, 1977); *see Jones v. District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 513 (D.C. Cir. 1974). In this action the Interior Department has clearly violated NEPA by its release of an inadequate programmatic impact statement. The Final EIS was not prepared with objective good faith nor would it permit a decision-maker to fully consider and properly balance the environmental factors. *Concerned About Trident et al. v. Rumsfeld et al., supra,* at 827.

The irreparable injury to the environment which would be caused were the new national coal leasing policy to continue is clear. The plaintiffs have satisfied the requirements for injunctive relief.

There are no material issues of fact in dispute and plaintiff is entitled to judgment as a matter of law.

An Order consistent with the foregoing has been issued this day.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

September 27, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL ET AL., *Plaintiffs*,

v.

ROYSTON C. HUGHES ET AL., *Defendants*.

ORDER

This cause having come on for hearing, upon notice, on cross-motions for summary judgment filed by all parties herein, based upon the complaint and answer, the answers of the federal defendants to the interrogatories and requests for admission propounded by plaintiffs, and various affidavits and exhibits filed by the parties; and

This Court having carefully considered all the evidence and having determined that the federal defendants have violated the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970) ("NEPA"), in their formulation, adoption and implementation of a new federal coal leasing program; and

It appearing to this Court that unless restrained or otherwise ordered, the federal defendants, until the President's Environmental Message to Congress of May 23, 1977 is fully implemented, will continue to carry out the new federal coal leasing program without complying with NEPA; and

The Court finding that such action by defendants would cause irreparable injury to the interests of plaintiffs and the general public; it is hereby

ORDERED, that plaintiffs' motion for summary judgment as against the federal defendants be and hereby is granted, and the motions for summary judgment of the federal defendants and defendant-intervenor Utah Power and Light Company be and hereby are denied.

It further appearing that federal defendants have violated their mandatory, nondiscretionary duty pursuant to NEPA to consider fully all the environmental impacts of, and alternatives to, a new federal coal leasing program before deciding to adopt and implement that program, it is further

ORDERED, that federal defendants, their agents and employees, and all those in concert or participation with them, are enjoined from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases, except when the proposed lease is required to maintain an existing mining operation at the present levels of production or is necessary to provide reserves necessary to meet existing contracts and the extent of the proposed lease is not greater than is required to meet these two criteria for more than three years in the future*; and it is further

ORDERED, that federal defendants, their agents and employees, and all those in concert or participation with them, are enjoined from failing to take all steps necessary to correct the violation of law found by this Court to have occurred, including specifically the following actions:

(1) Within 60 days of the entry of this Order, the federal defendants shall issue an official press release, publish a notice in the *Federal Register*, and take all other steps it believes appropriate (including sending an announcement to all those who have previously commented on the draft or final federal coal leasing programmatic EIS) to achieve widest possible dissemination of its announcement that it will reevaluate its coal leasing program and policy and that

* We have deliberately not adopted the defendants' revised short-term criteria of July 25, 1977, for the reason, among others, that said revised short-term criteria would permit defendants to award "preference right" leases without meeting the otherwise applicable requirements of said revised criteria for short-term leases.

it will accept comments on the final EIS issued in September 1975 for 60 days after publication of the announcement in the *Federal Register*.

(2) Thereafter, defendants shall prepare and publish a *draft* supplement to the final EIS, seeking to correct the defects found by this Court to exist, and responding to the significant issues raised in comments previously received on the draft and final EIS's. Publication of this draft supplement should be announced by appropriate notice in the *Federal Register* and elsewhere, as indicated above, and circulated to all interested federal, state and local governmental agencies and interested members of the general public. Comments shall be expressly invited thereon, with comments received until at least 45 days after the notice of release of the draft supplement is published in the *Federal Register*.

(3) Thereafter, defendants shall prepare a new final EIS, which combines and integrates the material in the draft supplement with the final EIS previously released, which fully responds to the comments received on the draft supplement, and which otherwise fully complies with NEPA.

(4) After the new final EIS has been made available to the public and is on file with the Council on Environmental Quality for at least 30 days, the defendant Secretary of the Interior shall personally reevaluate federal coal leasing policy, based on the information contained in the new final EIS, and shall make a new decision as to whether a new leasing program shall be instituted and, if so, what kind of program it should be.

Plaintiffs are awarded their costs of bringing this suit.

/s/ J. H. Pratt
John H. Pratt

United States District Judge

September 27, 1977

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

Natural Resources Defense Council, Inc., *et al.*,
Plaintiffs,

v.

Royston C. Hughes *et al., Defendants.*

Utah Power and Light Company, *Intervenor-Defendant.*

ORDER

Upon consideration of the plaintiffs' and federal defendants' joint motion under Fed. R. Civ. P. 60(b) for an Order modifying the Order entered September 27, 1977 in this action, and of the motion of defendant-intervenor Utah Power and Light Company under Rule 60(b) for a modification of said Order, and of plaintiffs' motion under Fed. R. Civ. P. 42(a) to consolidate this action with *Natural Resources Defense Council v. Berklund,* Civ. No. 75-0313, and for the reasons given in the Statement of Reasons Pursuant to Order of Remand filed this day and in the Statement issued May 2, 1978 with regard to the motion of defendant-intervenor, it is by the Court this 14th day of June, 1978,

Ordered, that the plaintiffs' and federal defendants' joint motion for an Order modifying the Order of September 27, 1977, be, and hereby is, granted; and it is further

Ordered, that the Order of September 27, 1977 be, and hereby is, modified to incorporate the Amended Proposed Modification as provided in the Amended Order entered this day; and it is further

ORDERED, that the motion of defendant-intervenor for an Order modifying the Order of September 27, 1977, be, and hereby is, denied; and it is further

ORDERED, that plaintiffs' motion to consolidate be, and hereby is, denied.

/s/ J. H. PRATT
John H. Pratt
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

ROYSTON C. HUGHES *et al.*, *Defendants*.

UTAH POWER AND LIGHT COMPANY, *Intervenor-Defendants*.

AMENDED ORDER

This cause having come on for hearing, upon notice, on cross-motions for summary judgment filed by all parties herein, based upon the complaint and answer, the answers of the federal defendants to the interrogatories and requests for admission propounded by plaintiffs, and various affidavits and exhibits filed by the parties including the stipulation between plaintiffs and the federal defendants dated April 6, 1978; and

This Court having carefully considered all the evidence and having determined that the federal defendants have violated the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, (1970) (NEPA), in their formulation, adoption, and implementation of a new federal coal leasing program; and

It appearing to this Court that unless restrained or otherwise ordered, the federal defendants, until the President's Environmental Message to Congress of May 23, 1977 is fully implemented, will continue to carry out the new federal coal leasing program without complying with NEPA; and

This Court finding that such action by defendants would cause irreparable injury to the interests of plaintiffs and the general public; it is hereby

ORDERED, that plaintiffs' motion for summary judgment as against the federal defendants be and hereby is granted, and the motions for summary judgment of the federal defendants and defendant-intervenor Utah Power and Light Company be and hereby are denied.

It further appearing that the federal defendants have violated their mandatory, nondiscretionary duty pursuant to NEPA to consider fully all the environmental impacts of, and alternatives to, a new federal coal leasing program before deciding to adopt and implement that program, it is further

ORDERED, that the federal defendants, their agents and employees and all those in concert or participation with them are enjoined from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing, and issuing any coal leases except:

(1) when the proposed lease is required to maintain an existing mining operation (a) at the average annual level of production existing as of September 27, 1977, or (b) to provide reserves necessary to meet binding contracts (excluding letters of intent and memoranda of understanding) existing on September 27, 1977, and the extent of the proposed lease is not greater than is required to meet criterion (a) or (b) for eight years in the future. Any lease issued under this paragraph will provide that annual production from the lease area shall not be greater than the average annual level of production existing as of September 27, 1977, or the amount needed to meet the annual requirements of the contract existing on September 27, 1977; or

(2) when the proposed lease is necessary because (a) mining operations existed on September 27, 1977, are being

conducted that could remove the coal deposit as part of an orderly mining sequence; and (b) the size, location, or physical characteristics are such that removal of the coal reserves sought to be leased, except in conjunction with ongoing operations, would (i) involve costs demonstrably so high that it would not be sufficiently profitable to develop the deposit in the reasonably foreseeable future or (ii) significantly increase environmental damage. This paragraph would not apply if there is any reasonable alternative by which the existing mine could continue operations and the coal deposit subject to the proposed lease could be mined at a later date without either (i) or (ii) occurring. The extent of the proposed lease cannot be greater than necessary to provide coal for five years in the future at the average annual level of production existing as of September 27, 1977; or

(3) when the Secretary determines to issue the proposed lease under the provisions of Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 in exchange for a federal coal lease in an alluvial floor, except that no lease may be issued under this paragraph in exchange for a federal lease held by an applicant who is not entitled to have its surface mining permit approved under Section 510(b)(5) of that Act; or

(4) when the proposed leases will be used to conduct a project authorized by the Administrator of the Energy Research and Development Administration under Section 908 of the Surface Mining Control and Reclamation Act of 1977, and the technology cannot be adequately demonstrated on existing leases or private coal holdings. Any such lease shall provide for no more than 500,000 tons annual production and the demonstration shall meet all of the requirements of regulations promulgated pursuant to Section 908; or

(5) the following lease applications:

(a) ES 12304 (Ky.)—Ryans Creek Coal Company

(b) Co 23396—Prosper Lombardi

(c) NM 28093—Western Coal Company

(d) NM-A 29460—Lower Colorado River Authority

(e) NM 26630 (Okla.)—General Portland, Inc.

(f) U 25683—Braztah Corp.

(g) U 28297—Coastal States

The federal defendants have determined that environmental impact statements are not required to be prepared on the total acreage sought in the applications listed in (a) and (b) and are required to be prepared on the total acreage sought in the applications listed as (c), (d) and (f). The determination whether an environmental impact statement is required for applications (e) and (g) has yet to be made.

Federal defendants are not enjoined from processing any lease application, as filed or as modified, to the extent necessary to determine whether it meets the criteria of paragraphs (1) through (4). Any lease which has been determined to meet any of the criteria of paragraphs (1) through (4) or which is listed in paragraph (5) shall be issued only in conformance with all applicable federal laws and regulations including the provision of Section 102(2)(C) of the National Environmental Policy Act.

Federal defendants will notify plaintiffs not less than 21 days before the Secretary of the Interior's approval of a lease sale offering concerning information which appears to qualify an applicant for a specific lease under the criteria of paragraphs (1) through (4) of this Order.

Nothing in this Order shall affect whatever rights federal defendants may have under Rule 60 of the Federal Rules of Civil Procedure to seek relief from the judgment of the Court or whatever defenses plaintiffs may have to any such relief sought by federal defendants.

Federal defendants are not enjoined from processing any preference right lease applications under Section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b), for the purpose of determining (a) whether the applications have been timely filed; (b) whether the prospecting permit was properly granted; and (c) if the prospecting permit was renewed, whether timely so. This Order does not prevent the federal defendants from evaluating the amount and quality of coal currently under federal lease and subject to preference right lease application which can be mined consistent with environmental standards such as reclamation potential, protection of endangered species, and preservation of prime farm lands and alluvial valley floors.

The federal defendants are authorized to process 20 preference right lease applications. The preference right lease applications are to be those which would cause the least environmental impact of all preference right lease applications pending before the Secretary on the date of this agreement. In selecting the 20 applications, the federal defendants shall choose first those preference right lease applications which (a) are for tracts on which at least 90% of the total reserves would be mined by deep mining rather than surface methods and the total amount of surface mining would affect no more than 50 acres; and (b) are for operations which would not require substantial additional transportation facilities or water storage or supply systems in the region and would not involve substantial new industrial development in the region. The Secretary shall not process any preference right lease applications under this section which will require the construction of substantial additional transportation facilities or water storage or supply systems in the region or which he has reason to believe may involve major new industrial development at or near the mine site.

As to these lease applications, such processing includes analysis of issues regarding the specific lease site, including analysis of logical mining units, preparation of environ-

mental impact statements or environmental assessments, and determinations of commercial quantities of coal.

Federal defendants are not enjoined from fully processing competitive coal lease application W 50061, Edison Development Company.

Federal defendants are not enjoined from engaging in any general studies or from preparing any general analyses or Environmental Impact Statements with regard to federal coal leasing on either a national or regional basis. Federal defendants may prepare comprehensive land use plans as long as they do not recommend the leasing of any tracts of federal coal; however, the plans can consider present and potential uses of the public lands. Federal defendants are not enjoined from making any decisions necessary to the formulation and completion of the new Programmatic Environmental Impact Statement required herein.

Plaintiffs will notify federal defendants of any action allegedly in violation of this Order and give defendants at least 21 days to cure the alleged violation before seeking relief from the Court.

It is further

ORDERED, that federal defendants, their agents and employees, and all those in concert or participation with them, are enjoined from failing to take all steps necessary to correct the violations of law found by this Court to have occurred, including specifically the following actions:

(1) Within 60 days of the entry of this Order, the federal defendants shall issue an official press release, publish a notice in the Federal Register, and take all other steps it believes appropriate (including sending an announcement to all those who have previously commented on the draft or final federal coal leasing programmatic EIS) to achieve widest possible dissemination of its announcement that it will reevaluate its coal leasing program and policy and that it will accept comments on the final EIS issued in September 1975 for 60 days after publication of the announcement in the Federal Register.

(2) Thereafter, defendants shall prepare and publish a draft supplement to the final EIS, seeking to correct the defects found by this Court to exist, and responding to the significant issues raised in comments previously received on the draft and final EIS's. Publication of this draft supplement should be announced by appropriate notice in the Federal Register and elsewhere, as indicated above, and circulated to all interested federal, state and local governmental agencies and interested members of the general public. Comments shall be expressly invited thereon, with comments received until at least 45 days after the notice of release of the draft supplement is published in the Federal Register.

(3) Thereafter, defendants shall prepare a new final EIS, which combines and integrates the material in the draft supplement with the final EIS previously released, which fully responds to the comments received on the draft supplement, and which otherwise fully complies with NEPA.

(4) After the new final EIS has been made available to the public and is on file with the Council on Environmental Quality for at least 30 days, the defendant Secretary of the Interior shall personally reevaluate federal coal leasing policy, based on the information contained in the new final EIS, and shall make a new decision as to whether a new leasing program shall be instituted and, if so, what kind of program it should be.

Plaintiffs are awarded their costs of bringing this suit.

This modification of the Court's Order of September 27, 1977, is retroactive to that date.

/s/ JOHN H. PRATT
John H. Pratt

United States District Judge

June 14, 1978

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Plaintiffs,

v.

ROYSTON C. HUGHES *et al.*, *Defendants.*

UTAH POWER AND LIGHT COMPANY, *Intervenor-Defendant.*

STATEMENT OF REASONS PURSUANT TO ORDER OF REMAND

On May 19, 1978, the Court of Appeals granted the joint motion of plaintiffs and federal defendants, filed pursuant to the procedure set forth in *Smith* v. *Pollin,* 194 F.2d 349, 350 (1952), to remand this matter to the District Court to modify its injunctive decree of September 27, 1977.

In its Order, the Court of Appeals noted that Intervenor-Defendant Utah Power and Light "raises the substantive argument that the proposed modified decree, like the decree of Sept. 27, is invalid because it violates the rights of preference right lease applicants." Order at 2. The District Court having previously "decided this issue without discussing it at length," the Order directed the District Court "to fully elaborate its reasoning, without prejudice to Utah Power's raising these arguments on appeal." Order at 3. Our elaboration follows.

Without needing to decide the question whether a preference lease applicant has a vested right to a lease or whether the Secretary of the Interior (hereinafter "Secretary") has no discretion not to issue such a lease, it is clear to us that the new federal coal leasing program of May 23, 1977 includes preference right leasing. The Secretary was

directed to "manage the coal leasing program to assure that it can respond to reasonable production goals *by leasing only those areas where mining is environmentally acceptable*" and "to scrutinize existing coal leases (and applications for preference right leases) to determine whether they show prospects *for timely development in an environmentally acceptable manner.*" (emphasis supplied) *President's Memorandum to Secretary of the Interior,* May 23, 1977. It is unquestioned that the Department of the Interior in setting forth the extent and scope of the federal leasing program covered by its programmatic EIS, stated that "action will include preference right applications, plus future competitive sales." *Coal Programmatic EIS, Summary, ¶ 2, §§ 1-80, 8-29, 8-32.*

Preference right leasing has an important role in national coal policy. In 1970, some 778,000 acres of federal land were under lease for coal development, from which 7.4 million tons of coal were produced that year. Preference right leasing applications covering almost 500,000 additional acres are presently pending with 10 billion tons of coal potentially recoverable. Clearly, these applications represent a large factor in any federal coal leasing program and to exclude them from the program's coverage would be to undercut the effectiveness of a national program.

Again, whether the preference right lease applicant has a vested right to a lease, the Secretary has the discretion under the Mineral Leasing Act to choose the terms for issuance of such a lease, as exemplified in the 1970 and 1973 moratoria, partial and total, on the issuance of federal prospecting permits and coal leases. Preference right leases which failed to meet the 1973 short-term criteria, for example, were not issued as a consequence. In 1976, this moratorium was lifted but in 1977 the Secretary announced new short-term criteria applicable to preference right leases, with an exception to such criteria when issuance was in the "public interest."

The Secretary also has the discretion to select the time to issue a preference right lease, to lease only part of the land covered by a prospecting permit and to set lease terms. *See* 30 U.S.C. §§ 201(b), 207. In an analogous case, the Court of Appeals recently held that the Secretary has the power to include as a condition of an oil and gas lease a clause permitting termination for environmental reasons and that NEPA requires that he consider the inclusion of such a clause. *State of Alaska v. Andrus,* No. 76-1829, Feb. 24, 1978, slip opinion pp. 40-42. The Mineral Leasing Act does not limit the Secretary's power to cancel administratively a permit or a non-competitive lease "on the basis of pre-lease factors." *Boesche v. Udall,* 373 U.S. 472, 478-85 (1963). The Act was intended to expand, not contract, the Secretary's control over the mineral lands of the United States. *Boesche v. Udall, supra,* 373 U.S. at 476, 481.

The injunctive order of September 27, 1977 was predicated on our conviction that preferential right leasing was a proper and integral part of the federal coal leasing program, that such a program was subject to the requirements of Section 102 of NEPA, and that the federal defendants violated NEPA in failing to provide an adequate Programmatic EIS. The modification of the September 27, 1977 Order to permit the Secretary, *inter alia,* to process 20 of the pending preference right lease applications, which he in his discretion decides as involving the least deleterious environment consequences, violates no existing rights of preference lease applicants. This is because under the September 27 Order, they have no right to have their applications processed at all, and under the modified order they have no right to have their applications processed by the Secretary in any particular sequence or in any particular period of time.

With respect to other matters adverted to by the Court of Appeals in its Order of Remand are whether it would promote the interests of judicial economy and consistency to consolidate this case with *Natural Resources Defense Council v. Berklund,* Civil No. 75-0313. We have given careful consideration to this matter and point out the following factors.

(1) The legal and factual issues in these two cases are so dissimilar and unrelated as to prevent their effective joint resolution. *Berklund* concerns the interpretation of § 2(b) of the Mineral Leasing Act of 1920 and the sole issue is whether the Secretary's duty to issue a "preference right" lease to an otherwise qualified applicant is mandatory or discretionary. In *Hughes,* the basic issue is whether the Secretary is required to prepare a programmatic EIS for the federal coal leasing program, including preference right leases and whether the submitted programmatic EIS is adequate. A narrow and tangential subsidiary issue is whether preference right leasing is to be included in the national program. The Court's disposition of *Hughes* will not predetermine the issue in *Berklund.* Accordingly, there is no "common question of law or fact" which would support this Court's exercise of discretion to order a consolidation pursuant to F.R.C.P. 42(a).

(2) The two cases are in different procedural postures. In *Hughes,* summary judgment was granted on September 27, 1977 and, after separate appeals by the federal defendants and intervening defendant Utah Power, the matter has been remanded to this Court for modification of the original summary judgment in the light of a proposed settlement between plaintiffs and federal defendants. This modified order has been issued this day. On the other hand, *Berklund* is before its third judge in three years awaiting oral argument on motions for summary judgment. Consolidation would materially delay a prompt determination in *Hughes* to the prejudice of the parties,[1] particularly the

[1] Plaintiffs, although favoring consolidation for reasons not difficult to imagine, nevertheless have previously argued that the issues in *Hughes* and *Berklund* are essentially different. Plaintiffs' Response to Supplemental Memorandum of Intervenor-Defendant Utah Power, May 27, 1978, pp. 1-2.

federal defendants, as manifested by the recent affidavits of the Secretary of June 8, 1978, and that of Guy Martin of April 3, 1978, both filed herein on June 8, 1978. These affidavits which stress the compelling importance of a prompt and final disposition of *Hughes* and the serious prejudice resulting from further delay, are attached hereto.

For the foregoing reasons, we find that judicial economy and consistency will not be promoted by a consolidation of these two cases, and if such considerations were present they are far outweighed by the prejudicial delay which would ensue. Accordingly, we have denied plaintiff's motion to consolidate filed June 5, 1978.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

June 14, 1978

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-1749

Natural Resources Defense Council, Inc., et al., *Plaintiffs,*

v.

Royston C. Hughes, et al., *Defendants,*

Utah Power and Light Company, *Intervenor-Defendant.*

STIPULATION

Whereas, federal defendants have initiated the formulation of a new environmental impact statement for the federal coal leasing program and are committed to preparing such a document, in compliance with the Court's Order of September 27, 1977;

Whereas, plaintiffs agree with federal defendants that during the formulation and preparation of this environmental impact statement, it is in the public interest to allow federal defendants to engage in the processing and issuance of federal coal leases in certain situations not authorized by the Court's Order of September 27, 1977;

Whereas, federal defendants' activities respecting federal coal are of such a complex and diverse nature that the scope of the general language of the Court's Order is subject to honest dispute;

Whereas, plaintiffs and federal defendants believe that clarification and modification of the scope of the Court's Order is best effected quickly and without an appeal disputing the meaning and appropriateness of the Court's Order—

Therefore, plaintiffs and federal defendants do hereby stipulate and agree as follows:

1. They will jointly submit the attached modification of the Court's Order of September 27, 1977, to the Court and urge its adoption; and

2. Upon its adoption:

(a) federal defendants agree they will withdraw the appeal previously filed in the Court of Appeals for the District of Columbia Circuit in this case;

(b) plaintiffs and federal defendants agree that if an appeal is prosecuted in this case they will support affirmance of the Court's order, as modified, in any appearance in an appeal as being in accordance with the National Environmental Policy Act and will not support any position to reverse or modify this order except any application made under Rule 60(b) of the Federal Rules of Civil Procedure and appeals therefrom.

/s/ BRUCE J. TERRIS	/s/ JOHN J. ZIMMERMAN
Attorney for Plaintiffs	Attorney for Federal Defendants
/s/ 2/25/78	/s/ February 25, 1978
Date	Date

PROPOSED MODIFICATION OF THE ORDER OF THE COURT IN *NRDC* v. *HUGHES*

ORDERED, that federal defendants, their agents and employees and all those in concert or participation with them are enjoined from taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing, and issuing any coal leases except:

(1) when the proposed lease is required to maintain an existing mining operation (a) at the average annual level of production existing as of September 27, 1977, or (b) to provide reserves necessary to meet binding contracts (excluding letters of intent and memoranda of understanding) existing on September 27, 1977, and the extent of the proposed lease is not greater than is required to meet criterion (a) or (b) for eight years in the future. Any lease issued under this paragraph will provide that annual production from the lease area shall not be greater than the average annual level of production existing as of September 27, 1977, or the amount needed to meet the annual requirements of the contract existing on September 27, 1977; or

(2) when the proposed lease is necessary because: (a) mining operations existing on September 27, 1977, are being conducted that could remove the coal deposit as part of an orderly mining sequence; and (b) the size, location, or physical characteristics are such that removal of the coal reserves sought to be leased, except in conjunction with ongoing operations, would (i) involve costs demonstrably so high that it would not be sufficiently profitable to develop the deposit in the reasonably foreseeable future or (ii) significantly increase environmental damage. This paragraph would not apply if there is any reasonable alternative by which the existing mine could continue operations and the coal deposit subject to the proposed lease could be mined at a later date without either (i) or (ii) occurring. The extent of the proposed lease cannot be

greater than necessary to provide coal for five years in the future at the average annual level of production existing as of September 27, 1977; or

(3) when the Secretary determines to issue the proposed lease under the provisions of Section 510(b)(5) of the Surface Mining Control and Reclamation Act of 1977 in exchange for a federal coal lease in an alluvial floor, except that no lease may be issued under this paragraph in exchange for a federal lease held by an applicant who is not entitled to have its surface mining permit approved under Section 510(b)(5) of that Act; or

(4) when the proposed leases will be used to conduct a project authorized by the Administrator of the Energy Research and Development Administration under Section 908 of the Surface Mining Control and Reclamation Act of 1977, and the technology cannot be adequately demonstrated on existing leases or private coal holdings. Any such lease shall provide for no more than 500,000 tons annual production and the demonstration shall meet all of the requirements of regulations promulgated pursuant to Section 908; or

(5) the following lease applications:

(a) ES 12304 (Ky.)—Ryans Creek Coal Company

(b) Co 23396—Prosper Lombardi

(c) NM 28093—Western Coal Company

(d) NM-A 29460—Lower Colorado River Authority

(e) NM 26630 (Okla.)—General Portland, Inc.

(f) U 25683—Braztah Corp.

(g) U 28297—Coastal States

Federal defendants are not enjoined from processing any lease application, as filed or as modified, to the extent

necessary to determine whether it meets the criteria of paragraphs (1) through (4). Any lease which has been determined to meet any of the criteria of paragraphs (1) through (4) or which is listed in paragraph (5) shall be issued only in conformance with all applicable federal laws and regulations including the provisions of Section 102 (2)(C) of the National Environmental Policy Act.

The federal defendants have determined that environmental impact statements are not required to be prepared on the total acreage sought in the applications listed in (a) and (b) and are required to be prepared on the total acreage sought in the applications listed as (c), (d) and (f). The determination whether an environmental impact statement is required for applications (e) and (g) has yet to be made.

Federal defendants will notify plaintiffs not less than 21 days before the Secretary of the Interior's approval of a lease sale offering concerning information which appears to qualify an applicant for a specific lease under the criteria of paragraphs (1) through (4) of this Order.

Nothing in this Order shall affect whatever rights federal defendants may have under Rule 60 of the Federal Rules of Civil Procedure to seek relief from the judgment of the Court or whatever defenses plaintiffs may have to any such relief sought by federal defendants.

Federal defendants are not enjoined from processing any preference right lease applications under Section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. 201(b), for the purpose of determining (a) whether the applications have been timely filed; (b) whether the prospecting permit was properly granted; and (c) if the prospecting permit was renewed, whether timely so. This Order does not prevent the federal defendants from evaluating the amount and quality of coal currently under federal lease and subject to preference right lease application which can be

mined consistent with environmental standards such as reclamation potential, protection of endangered species, and preservation of prime farm lands and alluvial valley floors.

The federal defendants are authorized to process 20 preference right lease applications. The preference right lease applications are to be those which the Federal Defendants and the Plaintiffs mutually concur would cause the least environmental impact of all preference right lease applications pending before the Secretary on the date of this agreement. If the Federal Defendants and Plaintiffs are unable to agree, the Federal Defendants shall submit a list of applications two times the number of disputed applications, but not less than 20 for final consideration. If agreement is not reached 10 days thereafter, the federal defendants shall select the remaining applications from the list. In selecting the 20 applications, the Federal Defendants shall choose first those preference right lease applications which (a) are for tracts on which at least ninety percent of the total reserves would be mined by deep mining rather than surface methods and the total amount of surface mining would affect no more than 50 acres; and (b) are for operations which would not require substantial additional transportation facilities or water storage or supply systems in the region and would not involve substantial new industrial development in the region. The Secretary shall not process any preference right lease applications under this section which will require the construction of substantial additional transportation facilities or water storage or supply systems in the region or which he has reason to believe may involve major new industrial development at or near the mine site.

As to these lease applications, such processing includes analysis of issues regarding the specific lease site, including analysis of logical mining units, preparation of environmental impact statements or environmental assessments, and determinations of commercial quantities of coal.

Federal defendants are not enjoined from fully processing competitive coal lease application W 50061, Edison Development Company.

Federal defendants are not enjoined from engaging in any general studies or from preparing any general analyses or Environmental Impact Statements with regard to federal coal leasing on either a national or regional basis. Federal defendants may prepare comprehensive land use plans as long as they do not recommend the leasing of any tracts of federal coal; however, the plans can consider present and potential uses of the public lands. Federal defendants are not enjoined from making any decisions necessary to the formulation and completion of the new Programmatic Environmental Impact Statement required herein.

Plaintiffs will notify federal defendants of any action allegedly in violation of this Order and give defendants at least 21 days to cure the alleged violation before seeking relief from the Court.

This modification of the Court's Order of September 27, 1977, is retroactive to that date.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

Civil Action 75-1749

No. 78-1656

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

v.

ROYSTON C. HUGHES, in his official capacity as Assistant Secretary of the Department of the Interior for Program Development and Budget, ET AL.,

UTAH POWER & LIGHT COMPANY, *Appellant*

and consolidated case Nos. 78-1664, 78-1710 and 78-1780

BEFORE: WRIGHT, Chief Judge

ORDER

On August 16, 1978, this Court issued an order directing the appellant in 78-1664 to show cause why the order from which it appealed should not be summarily affirmed. The order notes that three (3) orders and memoranda of this Court have been filed in related proceedings affirming denials of intervention by the District Court, and denying intervention on appeal in this Court, on the ground of untimeliness. The appeals in Nos. 78-1710 and 78-1780 raise related questions, and accordingly, it is

ORDERED, *sua sponte*, that appellants in Nos. 78-1710 and 78-1780 are directed to show cause, if any there be, within ten (10) days from the date of this order why the order of the District Court should not be summarily affirmed on the grounds of untimeliness.

Appellees should reply to appellants' responses within five (5) days thereafter, and should defer their response to the order in No. 78-1664 so that they may file a consolidated response in respect to all three appeals.

Supreme Court, U.S.
FILED
FEB 15 1979
MICHAEL RODAK, JR., CLERK

No. 78-954

In the Supreme Court of the United States

OCTOBER TERM, 1978

WESTERN FUELS ASSOCIATION, INC. AND MOON LAKE ELECTRIC ASSOCIATION, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-954

WESTERN FUELS ASSOCIATION, INC. AND MOON LAKE ELECTRIC ASSOCIATION, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the court of appeals (Pet. App. 8a-10a) are unreported. The order of the district court (Pet. App. 7a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1978. The petition for a writ of certiorari was filed on December 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly concluded that the district court did not abuse its discretion in denying petitioners' motion to intervene in this case.

STATEMENT

1. In 1971, the Secretary of the Interior imposed a general moratorium on new leasing of federal coal deposits. He subsequently announced that a comprehensive review of federal coal leasing policy would be undertaken, during which limited short-term leasing would be allowed. In August 1975, the Secretary issued a final programmatic environmental impact statement (PEIS) analyzing the environmental consequences of several alternative national coal leasing policies for lands under the Secretary's jurisdiction. In October 1975, Natural Resources Defense Council, Inc. (NRDC), filed this lawsuit claiming that the final PEIS was not adequate to fulfill the Secretary's responsibilities under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). NRDC sought an injunction to prohibit implementation of the new federal coal leasing program until an adequate PEIS was prepared.

Of the several coal industry representatives that submitted comments during the preparation of the PEIS, only one interested industry member—Utah Power and Light Company—then sought permission to intervene in the lawsuit. Utah Power was granted leave to intervene in January 1976 and has remained a party to the litigation since that time.

2. Several months after the lawsuit was filed, the parties submitted motions for summary judgment accompanied by extensive supporting material.[1] In September 1977, the district court granted NRDC's motion for

[1]The summary judgment motions were heard by the district court in July 1977. At that time, the court indicated that, unless an agreement by way of stipulation was submitted soon, it would have to enter an order granting NRDC's motion (Tr. of July 5, 1977, at 57-60).

summary judgment. The court held that the final PEIS failed adequately to examine alternatives to the proposed coal leasing program (Pet. App. 27a-30a). The court enjoined the Secretary from "taking any steps whatsoever, directly or indirectly, to implement the new coal leasing program, including calling for nominations of tracts for federal coal leasing and issuing any coal leases" (*id.* at 35a). The district court recognized, however, that some interim coal leasing would be necessary during the time that the PEIS was under revision and the program decision was under reconsideration. Consequently the court excepted from its injunction proposed leases "required to maintain an existing mining operation at present levels of production" and proposed leases "necessary to provide reserves necessary to meet existing contracts" (*ibid.*).

3. During the period that the litigation was pending in the district court, President Carter came into office and directed the Secretary to insure that the national coal leasing program will allow mining only in areas where mining is environmentally acceptable and compatible with other land uses. Specifically, the President directed the Secretary to scrutinize all existing leases and lease applications to decide whether it is likely that these will be developed in a timely and environmentally acceptable manner and to take necessary steps (1) to reevaluate the basis for granting or denying preference right leases;[2] (2) to exchange unsatisfactory leases and applications for equivalent rights to environmentally acceptable federal coal lands; and (3) to submit legislation to authorize

[2]Petitioners have pending applications for preference right leases under 30 U.S.C. 201(b). In August 1976, Congress abolished the Secretary's authority to issue preference right leases, subject to rights under existing lease applications and permits. Section 4 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083, 1085.

condemnation of leases if necessary to prevent environmental damage. 13 Weekly Comp. of Pres. Docs. 782, 785 (May 30, 1977).

In response to this directive, the Secretary initiated a comprehensive review of federal policy in July 1977 and ordered implementation of the national coal leasing program to be delayed pending completion of the policy review. At the time the district court entered its injunction in this case, the Executive Branch had thus independently determined not to proceed with the national coal leasing program that was the subject of the court's order.

The Secretary remained concerned, however, that the limited exceptions provided for interim coal leasing in the court's injunction were considerably more restrictive than the short-term leasing program the Secretary deemed necessary to sustain on-going operations.[3] The Secretary concluded that more flexibility for interim leasing was necessary during the period that a new PEIS was being prepared and a new program implemented, and the Secretary accordingly filed a timely notice of appeal.

4. While the appeal was pending, the Secretary entered into negotiations with NRDC in an effort to obtain agreement on a modification of the original injunction to expand the exceptions available for on-going mining operations pending completion of the national policy review. In February 1978, the Secretary and NRDC reached agreement on expanded exceptions for interim leasing and applied to the district court for a modification

[3]The Secretary had extensively revised his short-term leasing criteria to prevent abuses of the intent of those criteria. The Secretary also brought preference right leasing back within the coverage of the short-term criteria. Federal Defendants' Memorandum of July 25, 1977. (In 1976, the Secretary had lifted the restrictions of the short-term criteria for preference right leasing upon issuing regulations defining the "commercial quantities" of coal that must be shown to exist before preference right leasing can occur under 30 U.S.C. 201(b).

of the original injunction pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

5. After the Rule 60(b) motion was submitted to the district court, petitioners filed their initial motion to intervene in this case. Petitioners informed the court that they desired to adopt the legal position "abandoned" by the Secretary and would seek reversal of the court's injunction in its entirety (Mem. in Support of Motion to Intervene, March 13, 1978, at 12-15). Petitioners also advised the court of their contention that the Secretary has a non-discretionary duty to issue leases to petitioners as applicants for "preference" leases under Section 2(b) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 201(b). See note 2, *supra*.

The district court rejected petitioners' motion to intervene. The court noted that the case was then still pending in the court of appeals and that it therefore lacked jurisdiction over petitioners' motion (Pet. App. 1a). Petitioners then filed a petition for a writ of mandamus in the court of appeals, seeking an order directing the district court to exercise jurisdiction over their motion to intervene. This petition was denied by the court of appeals (*id.* at 2a).

6. Thereafter, the district court notified the court of appeals that it desired a remand of the case in order to modify its injunction pursuant to the request of the Secretary and NRDC. Petitioners moved to intervene in the court of appeals to oppose the proposed modification of the injunction, again arguing that they had a right to immediate issuance of leases.

On May 19, 1978, the court of appeals remanded the case to the district court to allow the court to consider the Rule 60(b) motion. At the same time, the court of appeals denied petitioners' motion to intervene, observing (Pet. App. 5a) that petitioners sought to raise issues previously decided by the district court in its original decision and

order.[4] The court of appeals noted that the arguments petitioners proposed to raise if they were allowed to intervene (Pet. App. 5a n.2)

> concern the alleged "non-discretionary, mandatory duty to issue a lease," Memorandum in opposition to Remand at 28. Those arguments would reopen the validity of the [district court's initial decision], as the District Court noted and Utah Power and Light conceded. Tr. of Hearing of April 3, 1978, at 59. Thus, intervention by appellants would reopen a key matter which has been previously litigated and decided.

The court of appeals also noted that petitioners' interests in this case were substantially protected by the participation of Utah Power and Light Company, which is also an applicant for "preference" leases and has raised "virtually identical" arguments (Pet. App. 6a).

7. Upon remand of the case to the district court, petitioners renewed their motion to intervene. This motion was again denied (Pet. App. 7a). The district court then entered an order amending its original injunction in accordance with the proposed modification jointly requested by the Secretary and NRDC (*id.* at 37a-45a). In entering its order, the district court again made clear that the injunction was applicable to the processing

[4]In its initial decision, the district court rejected the argument that "preference" leasing should be considered outside the scope of the national leasing program. The court found that the PEIS consistently referred to "preference" leasing as part of the national program and that no evidence had been offered to refute that finding. Consequently, the court stated (Pet. App. 31a n.22):

> For the purposes of this injunction and compliance with NEPA, "preference right" leasing will also be enjoined until the Programmatic EIS deficiencies are remedied.

and issuing of "preference" leases (Pet. App. 48a) (see also note 4, *supra*):

> The modification of the [injunction] * * * violates no existing rights of preference lease applicants. This is because under the [original] Order, they have no right to have their applications processed at all, and under the modified order they have no right to have their applications processed by the Secretary in any particular sequence or in any particular period of time.

8. Petitioners appealed from the denial of their motion to intervene, and the court of appeals affirmed (Pet. App. 8a-10a).[5] Noting that the merits of the original and the modified injunction are "considerably intertwined," the court concluded that the district court had not abused its discretion in denying intervention to petitioners because intervention at this late date "* * * would reopen prior decisions on key issues to the prejudice of existing parties to the suit" (*id.* at 9a).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' motion to intervene. The decision in this case is not in conflict with any other decisions and further review by this Court is unwarranted.

Petitioners claim (Pet. 17) that the district court abused its discretion in denying their motion to intervene because, once the Secretary "abandoned" his defense of the action, they should be permitted "to fill the void left by the retreating federal litigant." Petitioners argue that

[5]The appeal filed by Utah Power and Light Company from the district court's decision on the merits is still pending in the court of appeals. See page 8, *infra*.

their motion to intervene was timely because it was filed soon after they learned of the Secretary's agreement to consent to the modified injunction.

As this Court stated in *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), however, whether a motion for intervention is timely under Rule 24

> is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review [footnotes omitted].

The circumstances of this case support the district court's determination that petitioners' motion was not timely. First, the action taken by the President and the Secretary to reevaluate the national coal leasing policy, to suspend implementation of the national leasing program pending completion of the policy review, and to reimpose the short-term leasing program, occurred more than one year prior to petitioners' efforts to intervene in this litigation. To the extent that the Secretary may have altered his position subsequent to the initiation of this litigation, that change occurred substantially before petitioners sought to intervene. Moreover, as the court of appeals noted, petitioners seek to "reopen prior decisions on key issues to the prejudice of existing parties to the suit" (Pet. App. 9a). In particular, they seek a determination that "preference" leases are to be granted to them as a matter of right without regard to environmental considerations (*id.* at 5a n.2)—a claim that the district court has expressly rejected on two occasions (*id.* at 31a n.22, 48a). Finally, petitioners' contentions on the merits of this litigation are before the court of appeals in the appeal filed by Utah Power and Light Company. *NRDC* v. *Hughes*, No. 78-1656 (D.C. Cir.). As the court of appeals stated (Pet. App. 5a-6a), petitioners' interests "are substantially protected by the participation of Utah

Power and Light in the suit, since it, like them, is a prospective preference right lessee, and it has raised arguments virtually identical to theirs." There is thus no compelling reason to excuse petitioners' tardy application for intervention at this late stage of the litigation.[6]

The court of appeals fully examined the record and concluded that denial of intervention in the particular circumstances of this case was not an abuse of discretion (Pet. App. 9a). There is no reason for this Court to review this fact-oriented determination of the courts below.

---

[6]Petitioners claim that the decision in this case conflicts with *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977); *Stallworth* v. *Monsanto Co.*, 558 F. 2d 257 (5th Cir. 1977), and *NRDC* v. *Costle*, 561 F. 2d 904 (D.C. Cir. 1977). These cases, however, are distinguishable. In *United Airlines* and *Stallworth*, intervention was allowed after settlement where no party in the suit remained to represent the interests the potential intervenor and the class the intervenor proposed to represent. In this case the proposed intervenors are represented by a party still actively engaged in litigating its claims. Moreover, here, unlike in *United Airlines* and *Stallworth*, it does not appear that the proposed intervenors acted immediately upon the change of position by the litigants. See page 8, *supra*. In *NRDC* v. *Costle*, intervention was deemed timely where the intervenors did not seek to reopen settled issues but proposed to participate only in the remedial phase of the case involving implementation of the final judgment. Here, by contrast, petitioners propose to challenge determinations made by the district court in both its original and modified injunctions. See page 8, *supra*. Each of the circumstances that distinguish this case from the decisions on which petitioners rely supports the discretionary determination of the district court to deny intervention in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-954

WESTERN FUELS ASSOCIATION, INC. and
MOON LAKE ELECTRIC ASSOCIATION, *Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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INTRODUCTION

Western Fuels Association, Inc. (Western Fuels) and Moon Lake Electric Association (Moon Lake) have filed a petition seeking review of one question: Whether intervention may be denied where intervention is sought after judgment has been entered in the district court and where the parties to the action jointly seek an amended judgment in the district court which will substantially, materially and adversely affect the rights of the applicant for intervention.

The federal respondents filed a brief in opposition to Western Fuels' and Moon Lake's petition. The respondents Natural Resources Defense Council, Inc., Environmental Defense Fund, Inc., Northern Plains Resource Council and Powder River Basin Resource Council filed no brief in opposition. Rather, by a pleading dated February 21, 1979, those respondents adopted the position of the federal respondents and urged denial of the petition for a writ of certiorari. Thus, the comments here relate solely to the federal respondents' brief.

In large part, Western Fuels' and Moon Lake's petition adequately answers the contentions raised by the federal respondents. However, clarification is necessary on two points raised by the federal respondents.

ARGUMENT

Both in the "Statement" and "Argument" sections of the federal respondents' brief, there are assertions that intervention by Western Fuels and Moon Lake would result in the reopening of prior decisions on key issues, to the prejudice of existing parties to the litigation. This key prior issue is whether the Secretary of the Interior has a mandatory, non-discretionary duty to issue leases to preference right lease applicants who have made the showings required by Section 2(b) of the Mineral Leasing Act of 1920[1] and by relevant Interior Department regulations.[2]

[1] 30 U.S.C. § 201(b).

[2] 43 C.F.R. § 3520.1-1.

In their *initial* papers filed in the proceedings below, Western Fuels and Moon Lake indicated that the "lease issuance" issue would be raised. However, *prior to* the specific decisions of the District Court and the D.C. Circuit for which review is sought here, Western Fuels and Moon Lake made it clear beyond peradventure that the "lease issuance" issue would not be raised or litigated should their intervention be granted.

In their May 30, 1978 supplemental memorandum[3] to the District Court, Western Fuels and Moon Lake stated:

> Western Fuels and Moon Lake take this opportunity to clarify beyond any doubt the extent to which they seek to participate in this proceeding should intervention be granted.
>
> * * *
>
> Western Fuels and Moon Lake's participation will be related solely to the proposed modification of order. They will seek to have this Court conduct an evidentiary hearing prior to its approval of the proposed modification of judgment. They will seek to have this Court consider their arguments in opposition to the proposed modification of judgment on the grounds stated in other pleadings already on file with this Court as supplemented and limited by this supplemental memorandum.

In even more explicit fashion, Western Fuels and Moon Lake stated to the Court of Appeals:

> We concede that as respects a challenge to the injunction against *issuance* of preference right

[3] Supplemental Memorandum of Western Fuels Association, Inc. and Moon Lake Electric Association in Support of Their Reinstated Motion to Intervene, filed May 30, 1978, United States District Court for the District of Columbia, Civil No. 75-1749, at 7-8.

leases, our intervention would be untimely, and in any event our interests would be adequately represented by Utah Power and Light. But, for the reasons herein stated, intervention by Western Fuels and Moon Lake for purposes of challenging the proposal to amend the September 27, 1977 order to prohibit *processing* of preference right lease applications, which processing was underway but came to a screeching halt by reason of the federal defendants' self-inflicted "settlement" wound, is timely under *Costle, supra.*[4]

It is axiomatic that litigants must take affirmative actions to preserve issues for judicial decision and review. *See, e.g., Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976); *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976); *United States* v. *American Ry. Express Co.,* 265 U.S. 425, 435-36 (1924). Here, Western Fuels and Moon Lake are not only abandoning the "lease issuance" issue, but are actively abjuring and renouncing any reliance on that issue.

Despite these actions, the "lease issuance" issue remains like an albatross and has tainted the participation of Western Fuels and Moon Lake at all levels of this litigation. To the extent that the federal respondents rely on this rejected "lease issuance" issue as a tool to oppose the petition, that reliance is improper. This line of attack on the petition should be disregarded.

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[4] Response of Western Fuels Association, Inc. and Moon Lake Electric Association (Appellants in No. 78-1780) to Order to Show Cause Dated August 25, 1978, filed September 8, 1978, United States Court of Appeals for the District of Columbia Circuit, No. 78-1780, at 13-14. The *Costle* case referred to in that quotation is *Natural Resources Defense Council, Inc.* v. *Costle,* 561 F.2d 904 (D.C. Cir. 1977).

The second area of clarification concerns the timing of Western Fuels' and Moon Lake's initial petition to intervene before the District Court. The federal respondents argue on pages 8 and 9 of their brief that the federal defendants' change in litigation position occurred substantially before Western Fuels and Moon Lake sought to intervene before the District Court. The record reflects otherwise.

An analysis of the history of the litigation indicates that the initial petition to intervene was filed within ten days of formal notification of the federal defendants' changed position. The underlying litigation was initiated on October 21, 1975. The federal defendants below actively and forcefully litigated that case. On cross-motions for summary judgment, the District Court entered its order in favor of the plaintiffs on September 27, 1977. The federal defendants filed a timely notice of appeal. The next formal action undertaken in the litigation was the joint filing of a Rule 60(b) motion by the plaintiffs and federal defendants on March 3, 1978, whereby the District Court, other parties, and interested persons such as Western Fuels and Moon Lake, first received notification of the change in the federal defendants' litigation stance. Prior to the filing of that motion, the federal defendants were appellants seeking to overturn the adverse District Court determination. Indeed, assuming that Western Fuels and Moon Lake had any information that federal defendants were considering undertaking a change in position, intervention into the lawsuit by Western Fuels and Moon Lake based upon that potential change in position could have been declared premature prior to formal action by the federal defendants.

Further, during the time period between the September 27, 1977 District Court decision and the filing of the March 3 joint motion, actions within the Department of Interior reflected that the federal defendants had not altered their position on the processing of federal preference right lease applications.[5] Only after the execution of the agreement and the filing of the joint motion under Rule 60(b) did the *processing* of lease applications cease.

Since, as shown above, Western Fuels and Moon Lake seek intervention to object to the cessation of the processing of preference right lease applications, their initial petition to intervene, filed ten days after notice of the federal defendants' decision to terminate lease processing, must be deemed timely.

Obviously, Western Fuels and Moon Lake request that the Court grant their petition for a writ of certiorari. However, they also urge that additional relief from this Court is appropriate and they request summary reversal of the judgment below.

First, Western Fuels and Moon Lake submit that a review of the petition and opposing brief reflect that the respondents have totally failed to distinguish this case from cases decided by this Court and other courts where intervention was granted.[6] Additional review of the factual analyses and legal arguments is unnecessary to decide this case. Also, Western Fuels and Moon

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[5] A summary of these actions is found on pages 7 and 8 of Western Fuels' and Moon Lake's petition.

[6] *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977); *Stallworth* v. *Monsanto*, 558 F.2d 257 (5th Cir. 1977); *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976) *aff'd* 432 U.S. 385 (1977).

Lake will be injured by the passage of time during which this Court deliberates the merits of the petition, while the parties prepare briefs and until the case is finally decided. As reflected in the federal respondents' brief, the underlying litigation is moving forward. If Western Fuels and Moon Lake are to receive any benefit from intervention in the case, that intervention must occur, at the latest, while the case is still pending before the D.C. Circuit. Summary reversal is both appropriate and necessary in this case.

CONCLUSION

For these reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the District of Columbia Circuit be summarily reversed, or, in the alternative, that a writ of certiorari issue to review that judgment.

Respectfully submitted,

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